SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 320

JOSEPH G. BATTAGLIA, ARTHUR G. BECKER, ET AL.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION, a Delaware Corporation

No. 321

FRANK HOLLAND and PETER J. SANCHI, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

No. 322

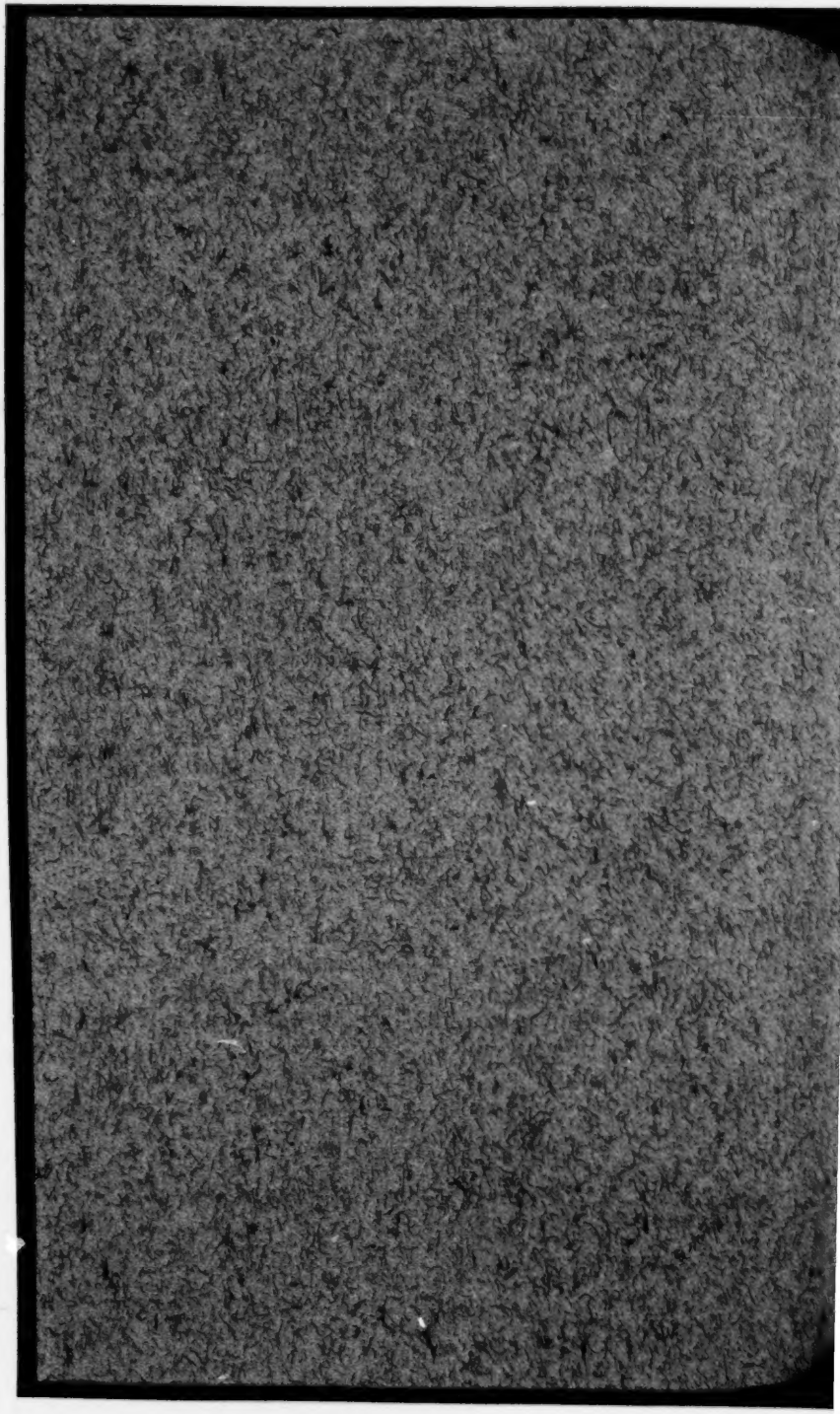
WILLIAM S. HILGER, SAMUEL KIRCHER and JOSEPH J. VILLELLA, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

No. 323

WALTER J. CASHERTA, Individually, etc.,
Petitioners,
vs.
GENERAL MOTORS CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MARLY FLEISCHMANN,
DAVID DIAMOND,
Counsel for Petitioners.



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Nos. 320-21-22-23

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Respondent

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition respectfully shows:

I

The Matter Involved

The petitioners in these cases challenge the validity under the Federal Constitution of the Portal-to-Portal Act of 1947 (29 U. S. C. A. 251-262, 61 Stat. 84, 90). They assert, first, that this statute deprives them of their property without due process of law; and, second, that the statute usurps the functions of the federal judiciary by attempting to dictate the decision in particular pending cases.

This petition presents the first test of the constitutionality of the Portal-to-Portal Act to reach this Court. The issues

presented are believed to be of grave and permanent significance, involving fundamental questions as to the relationship between Congress and the courts.

II

Proceedings in the Courts Below

This Court is asked to review four judgments of the United States Court of Appeals for the Second Circuit entered July 8th, 1948, affirming judgments of the United States District Court of the Western District of New York dismissing the complaints in each case. The four cases present identical questions and were heard and considered together in the courts below.

The actions were commenced before the enactment of the Portal-to-Portal Act in 1947. Each complaint stated a cause of action under the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201-219, 52 Stat. 1060-1069), as it existed prior to the enactment of the Portal-to-Portal Act of 1947. The complaints in substance allege that each plaintiff, as an employee of the defendant, performed over-time work, labor and services for the defendant for which he was not compensated as required by the Fair Labor Standards Act (R. 19-27). Among the principal types of uncompensated over-time activities alleged are necessary changes into and out of work clothes or protective clothing, and the obtaining, preparing and returning of tools and equipment required in plaintiffs' work; the same type of activities on the employer's premises as were considered compensable by this Court in *Anderson* v. *Mt. Clemens Pottery Company*, 328 U. S. 680, 90 L. Ed. 1515.

The Portal-to-Portal Act became law on May 14th, 1947. Shortly thereafter, the defendant moved in each case to dismiss the complaint under Rule 12 b (1) of the Rules of Civil

Procedure "for lack of jurisdiction over the subject matter" (R. 28-29).

In setting forth the grounds of the motion, the defendant generally followed the wording of the Portal-to-Portal Act. The theory of the motion was that the complaints failed to allege facts showing the recovery sought by the plaintiffs to be based upon an express provision of a contract, or upon custom or practice, and failed to show that plaintiffs' activities were "engaged in during the portion of the day with respect to which they were made compensable under any alleged contract provision, custom or practice which allegedly makes such activities compensable."

Prior to the argument of the motion in each case, plaintiffs specifically raised the objection that the Portal-to-Portal Act was unconstitutional, filed appropriate notice to that effect and served it upon the United States Attorney General (R. 30). Thereupon, the United States of America intervened and filed a brief in support of the constitutionality of the Act.

On December 15, 1947, Judge John Knight of the United States District Court for the Western District of New York handed down an opinion upholding the constitutionality of the Act and directing the entry of orders dismissing the complaints, unless amendments were made stating a cause of action under the Portal-to-Portal Act (R. 37-53). No such amendments being made, final orders were entered in each case on March 15, 1948, dismissing the complaints (R. 56-57).

Petitioners filed a consolidated appeal to the United States Court of Appeals for the Second Circuit where the judgments of the District Court were unanimously affirmed with an opinion by Chase, J. (R. 69-82).

Statutory and constitutional provisions which are involved in this appeal are set out in an Appendix to the brief submitted with this petition.

III

The Questions Presented

The questions presented for the determination of this court are these:

1. May the Portal-to-Portal Act of 1947 be upheld as a valid congressional regulation of the jurisdiction of the Federal Courts, irrespective of its substantive effect?

2. Does the Portal-to-Portal Act of 1947 deprive the petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

3. May the Portal-to-Portal Act of 1947 be upheld as a valid use of the power to regulate commerce, by reason of the Congressional finding of a national emergency?

4. Does the Portal-to-Portal Act of 1947 violate Article III, Sec. 1 of the Constitution, as an attempt by Congress to exercise judicial power reserved to the courts?

IV

Jurisdiction

The jurisdiction of this Court is based upon Title 28, United States Code, Sections 1254(1) and 2101(c). The judgments of the Court of Appeals were entered on July 8th, 1948 (R. 82) and this petition is filed within 90 days thereof.

V

The Basis for This Court's Jurisdiction to Review the Judgments and the Reasons Relied upon for the Allowance of the Writ.

1. The Court of Appeals, in holding the Portal-to-Portal Act of 1947 constitutional, has decided an important and

substantial Federal question which has not been, but should be settled by this Court.

The question of the constitutionality of this legislation has been inherent and notorious since it was first proposed. At one point, alternative provisions were included in the Senate Bill, to take effect if the preferred version should be held invalid.

See: Bureau of National Affairs, "Special Analytical Report" Pg. 83, 47 Columbia Law Review 1010.

Since its validity has been under attack in the courts, many doubts have been expressed as to the propriety and constitutionality of the Act.

See: *Cochran* v. *St. Paul & Tacoma Lumber Co.*, 73 F. Supp. 288;

Boehle v. *Electro Metallurgical Co.*, 72 F. Supp. 21;

Sveltik v. *Vultee Aircraft Corp.*, 16 U. S. Law Week 2161, 7 W. H. Cases 282 (Not officially reported).

Finally, although the Act has been upheld in three circuits by the Courts of Appeal, there is no unanimity of opinion on the basis of the decision.

Seese v. *Bethlehem Steel Company*, 168 Fed. 2d 58;
Rogers v. *Reynolds*, 166 Fed. (2d) 317.

An authoritative decision of this court is required in order that the rights of several thousand litigants in actions now pending in the District Courts may finally be determined.

2. The Court of Appeals has decided important questions of Federal law in a way which appears to conflict with applicable decisions of this court.

(a) In holding that the rights of which petitioners were deprived by Section 2(a) of the Act are not protected by the Fifth Amendment to the United States Constitution,

the Court of Appeals failed to follow and apply the following decisions of this court, among others:

Pacific Mail Steamship Company v. *Joliffe*, 2 Wallace 450, 17 L. Ed. 805;
United States v. *General Motors Corporation*, 323 U. S. 373, 89 L. Ed. 311;
Ettor v. *City of Tacoma*, 228 U. S. 148, 57 L. Ed. 773;
Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866.

(b) In failing to condemn the Portal-to-Portal Act as a legislative invasion of the judical power in violation of Article III, Section 1 of the Constitution, the Court of Appeals reached a decision not consistent with the following authorities in this Court:

Kilbourn v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377;
James v. *Appel*, 192 U. S. 129, 48 L. Ed. 377;
Prentis v. *Atlantic Coastline Co.*, 211 U. S. 210, 53 L. Ed. 150;
United States v. *Klein*, 13 Wallace 128, 20 L. Ed. 519.

Wherefore, your petitioners respectfully pray that Writs of Certiorari issue to review the decision of the Court of Appeals for the Second Circuit in these actions.

For the Petitioners:

MANLY FLEISCHMANN,
DAVID DIAMOND,
Counsel for Petitioners.

Dated: SEPTEMBER 29TH, 1948.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement

These appeals involve the constitutionality of the Portal-to-Portal Act of 1947 (Title 29 U. S. C. 251-262; 61 Stat. 84-90). The petitioners contend that this statute, as construed by the courts below, deprives them of their property without due process of law in violation of the Fifth Amendment, and exercises judicial power reserved to the courts in violation of Article 3 Section 1 of the Constitution. Relevant portions of the Statute and Constitution are set forth in an appendix to this brief.

Point I

The Validity of Sec. 2(D) of the Portal-to-Portal Act of 1947, attempting to withdraw jurisdiction of this type of case from the Federal courts, depends upon the validity of the destruction of substantive rights attempted by Sec. 2(a).

Since the Court of Appeals adopted petitioners' contention on this point, no further argument is deemed appropriate in this connection. As the court below said:

> "We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. . . . Under this view, subdivision (d) on the one hand and subdivisions (a) and (b) on the other will stand or fall together." (R. 73.)

Point II

The Portal-to-Portal Act violates the Fifth Amendment to the Constitution by depriving petitioners of their property without due process of law.

The Fifth Amendment to the Constitution provides that the federal government may not deprive an individual of his property "without due process of law". It is well settled that "a vested right of action is property • • • and is equally protected against arbitrary interference." *Pritchard* v. *Norton*, 106 U. S. 124, 132, 27 L. Ed. 104, 107.

The extent of the constitutional protection of property rights is set forth in a recent opinion of this Court in a case where the present defendant successfully invoked the identical constitutional safeguards upon which these petitioners now rely:

> "The constitutional provision" (i.e., the Fifth Amendment) "is addressed to every sort of interest the citizen may possess."
>
> *United States* v. *General Motors Corporation*, 323 U. S. 373, 378, 89 L. Ed. 311, 318.

Many of the cases which pass upon the right of a legislative body to interfere with vested contractual rights are concerned with state legislative activity. These cases, therefore, involve the Fourteenth Amendment, which is the "due process" provision applicable to state activity, or Article 1, Sec. 10, which forbids the impairment of the obligation of a contract by a state. However, the treatment of this subject by this court has been almost identical with respect to controversies between individuals, whether state or legislative activity is being reviewed. In other words, the Fifth Amendment protects private contractual rights and vested causes of action against federal legislative impairment, in the same manner and to the same extent as

do the Fourteenth Amendment and Sec. 10 of Article 1 with respect to comparable state legislation.

During the congressional debates accompanying the passage of the Portal-to-Portal Act, it was claimed that a general exception to the rule protecting vested rights from retroactive legislative impairment exists with respect to rights which have accrued under a statute. It was asserted that such rights never vest in a constitutional sense, and disappear with the repeal of the statute which created them. The court below was apparently of this opinion although it did not base its decision primarily on this point, since it considered the exact nature of the rights asserted to be immaterial. It is submitted, however, that a review of the decisions on this point by this court will demonstrate that no such general exception with respect to "statutory rights" has ever been recognized. We refer to a few pertinent cases.

In *Pacific Mail Steamship Company* v. *Joliffe*, 2 Wallace 450, 17 L. Ed. 805, this court considered a California statute which provided that a pilot was entitled to half pilotage fees when, under certain circumstances, he had offered his services to a vessel and those services had been refused. Pending a suit for recovery of the compensation *due under the statute*, the legislature repealed the statute. In permitting the recovery, as against the argument that the original right was defeasible because "statutory" in origin, the court said, at pp. 806-807 of the L. Ed. report:

> "The claim to half pilotage fees, it is true, was given by the statute, but only in consideration of services tendered * * *. If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. * * *
>
> "The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as

a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

It will be obvious that there is a perfect analogy between the *Joliffe* case and the present case: In both cases recovery was sought for compensation fixed by the terms of a statute which was repealed while an action to recover was pending. In both cases it might well be argued that no right of recovery could exist without the statute. In fact, the present case is stronger than the *Joliffe* case, because here the services were not merely tendered, but actually performed.

In *Ettor* v. *City of Tacoma,* 228 U. S. 148, 57 L. Ed. 773, an action had been brought under the terms of a state statute which required compensation from a municipality for damage to the plaintiff's property, resulting from street grading. Before judgment, the statute was repealed, and the suit was then dismissed.

In reversing the judgment of dismissal, this court said:

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which

had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (p. 156 of the U. S. report.)

The latest case in this court to apply this doctrine was *Coombes* v. *Getz*, 285 U. S. 434, 76 L. ed. 866. A provision of the California state constitution created a liability on the part of directors of corporations to creditors for all moneys misappropriated by corporate officers. During the pendency of a suit to recover on this statutory liability, the section making the directors liable was repealed. In the absence of such a section, there was no liability at common law. Upon appeal to this court the creditor was permitted to recover. We quote from the opinion:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right * * *) to enforce his cause of action upon the contract. (p. 442 of the U. S. report.)

"Here both parties acted. The creditor extended credit to the corporation; and his action in so doing under the state constitutional provision brought into force for his benefit the constitutional obligation of

> the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eyes of the law, created against himself a contractual liability in the nature of a suretyship." (p. 448 of the U. S. report.)

From the foregoing review of the authorities, it is apparent that as a general rule statutory rights are protected against retroactive legislative destruction to the same extent as any other vested rights. We may now consider some of the cases which the congressional debaters presumably had in mind when they so facilely expressed the opinion that "statutory rights do not vest".

(1) *Inchoate statutory rights based on a contingency which has not happened.* It is well settled that a statutory right which by the terms of its enactment does not ripen until the happening of a specified contingency, may be destroyed by a repealing statute which takes effect prior to such happening. Typical was *Randall* v. *Krieger*, 90 U. S. 137, 23 L. ed. 124, where it was held that the statutory right of a widow to property of her deceased husband is subject to legislative invasion before the death of the husband.

(2) *Statutes which confer a gratuity.* A second class of case in which statutory rights are held subject to repeal involves statutes which confer a gratuity, resting on no legal or moral claim (other than the statute), and for which no consideration has been given. Such a case was *In re Hall*, 167 U. S. 38, 42 L. ed. 69, where a repealing statute, *pendente lite*, was held valid upon the ground that the original statute simply conferred a gratuity:

> "This Court had just decided that the act of February 13, 1895 (28 Stat. at L. 664, chap. 87), simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal

> authorities of the District, but that the act provided for a gift which was wholly without consideration." (pp. 42-43 of the U. S. report.)

It need hardly be pointed out that the petitioners here do not seek to vindicate a right founded upon a governmental or personal bounty. They seek no gratuity from the United States but simply attempt to enforce a right based upon services rendered by employees for private employers, under an act which required that all of an employee's time given to his employer should be compensated.

(3) *Statutes which create a penalty.* As a corollary to the rule respecting legislative gratuities, legislation creating penalties may be repealed even if such action interferes with causes of action pending at the time. Typical of this exception was the case of *Norris* v. *Crocker,* 13 Howard 429, 14 L. ed. 210, where it was held that an action for the penalties established by the Fugitive Slave Law of 1793, in favor of a slave owner and against a person who had harbored a slave, was not maintainable after the statutory provision had been repealed. The court pointed out that the penalty was payable regardless of loss or injury, and accordingly no right could vest therein.

(4) The largest and most important class of cases in which some interference with statutory right is permitted involves *changes in available remedies provided by statute.* The general rule on this subject is stated in *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332, 78 L. ed. 342, 347;

> "* * * although a vested cause of action is property and is protected from arbitrary interference (*Pritchard* v. *Norton,* 106 U. S. 124, 132, 27 L. ed. 104, 107, 1 S. Ct. 102), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

The quotation indicates the limitation of the doctrine: *it may not be invoked to validate the entire destruction of rights through the denial of any effective remedy.* It is clear that the doctrine cannot apply to a statute such as is here considered, which purports to eliminate both right and remedy *in toto.* Even in cases such as *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413, which have upheld reasonable legislative changes in available remedies, the court has been careful to note the limitation:

> "This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." (p. 439 of the U. S. report.)

(5) *Statutes which cure a defect in administration or legalize previously illegal contracts.* A final class of cases in which legislative alteration of existing statutory rights or liabilities is permitted includes cases such as *Paramino Lumber Co.* v. *Marshall,* 309 U. S. 370, 84 L. ed. 814, and *National Car Loading Corp.* v. *Phoenix-El Paso Express,* 176 S. W. 2d 564, cer. den., 322 U. S. 747, 88 L. ed. 1578. In the *Paramino* case, this court upheld a private act of Congress directing a review of a final order denying compensation to a claimant, after the time for review had expired. The act had been passed in consequence of the fact that the testimony forming the basis for the original finding turned out to be mistaken, and the mistake could not have been earlier discovered. Justice Reed, writing for the court, said:

> "It" (the private act) "does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing

injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause." (p. 378 of the U. S. report.)

On a similar theory, this court has upheld the propriety of a legislative change permitting the bringing of a suit barred under the existing statute of limitations (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 89 L. ed. 1628). The same doctrine was applied for the benefit of the government in *Graham* v. *Goodcell*, 282 U. S. 409, 75 L. ed. 415, but in so doing the court expressly approved the principle of the *Joliffe* and *Ettor* cases cited above:

"The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 457, 458, 17 L. ed. 805, 807; *Ettor v. Tacoma*, 228 U. S. 148, 156, 57 L. ed. 773, 778, 33 S. Ct. 428; *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 258 U. S. 338, 340, 66 L. ed. 647, 649, 42 S. Ct. 325." (p. 426 of the U. S. report.)

During the congressional debates, considerable attention was paid to the denial of certiorari in the *National Car Loading* case, *supra*, though in the absence of an opinion by this court, it is evident that the case can not be relied upon as overthrowing the clear line of decision to which we have referred. In that case, the Supreme Court of Texas upheld a statute which legalized a contract, illegal when made, and by so doing terminated a pending cause of action based upon the former statute. Obviously, the case bears no similarity to the present case, because there the plaintiff had been deprived of nothing and had furnished no consideration. The opinion in the Texas court is based almost

entirely upon the cases approving "curative legislation," such as the *Paramino* case just discussed.

We may now consider whether the present case is governed by the rules enunciated in the *Joliffe* case and in the succeeding opinions of this court, or whether it falls within a supposed exception permitting the repeal and destruction of rights which have accrued under a statute. The answer is perfectly clear, since the present case bears no resemblance to any of the exceptions which we have pointed out. The right which the plaintiffs seek to enforce is not in any sense a gratuity as to them, nor is it a penalty as against their employers; this court has expressly so held and has stated that even the liquidated damage provision "is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 707, 89 L. ed. 1296, 1309.

As in the *Joliffe* case, the employer by accepting the services entered into a contractual relationship, and the contract included the provisions of the statute in its terms by operation of law. (Compare the recent decision of the New York Court of Appeals in *Filardo* v. *Foley Bros.*, 297 N. Y. 217.)

Just as in the *Coombes* case, plaintiffs here have done everything necessary to perfect their cause of action and have furnished consideration through the performance of services. By reason thereof, rights have accrued and vested which may not now be destroyed. The contract was clearly legal when made, and the new statute does not purport to correct any defect in the administration of justice. On the contrary, the statute plainly falls within the prohibition against legislative action destroying all remedy re-

ferred to in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682, 74 L. ed. 1107, 1114.

It follows that the Portal-to-Portal Act of 1947 must be declared unconstitutional, as an attempt to take the property of these petitioners without due process of law.

Point III

The Congressional finding of an "Emergency" calling for the use of the commerce power cannot justify the total destruction of petitioners' property rights.

The principal basis of the Court of Appeals' decision is found in the following statement from its opinion:

> "It is the fact that here Congress was exercising its commerce power which, we think, primarily serves to distinguish the cases relied upon by appellants." (R. 80)

We suppose that the court did not intend to hold that the commerce power alone was immune from the operation of the Fifth Amendment. On the contrary, the Court in an earlier part of its opinion (R. 73) cites with approval *Louisville Joint Stock Land Bank* v. *Radford, supra*, 295 U. S. 555, 589 where this court had said:

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."

Even the congressional war power is subject to the same restriction:

> *United States* v. *General Motors Corp., supra*, 323 U. S. 373, 89 L. ed. 311.

What the court below really had in mind appears, we submit, from this sentence:

"The congressional findings, made after investigations which disclosed ample supporting facts, show fully why the enactment of the Portal-to-Portal Act was necessary to avoid great injury to interstate commerce." (R. 77-79.)

Put another way, the court found justification for the destruction of petitioners' rights in the congressional finding of a national emergency. This leads us to a consideration of the so-called "emergency doctrine" as applied by this court.

From time to time, this court has approved federal legislation on the theory that in times of national emergency, the power of Congress may be extended to an extent reasonably necessary to meet such emergency. The doctrine proceeds on the assumption that while an emergency can never create a power which theretofore did not exist, the existence of an emergency may justify the exercise of power which might otherwise be unreasonable and therefore illegal.

Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398, 78 L. ed. 413.

This doctrine is subject to the following limitations:

(1) There must be a genuine emergency within the general powers of Congress to meet by legislation, and the existence of the emergency is always open to judicial scrutiny.

(2) The legislative means taken to meet the emergency must be reasonable and non-discriminatory.

(3) Rights and remedies may be impaired to some extent when such impairment is required by the emergency, but if rights are totally destroyed, the government must compensate the owners of these rights.

Typical of the "emergency" cases was *Norman* v. *B. & O. Railroad,* 294 U. S. 240, 79 L. ed. 885, the so-called "gold

clause" case. Here it was held that legislation forbidding payment in gold was within the general power of Congress because of its control over the monetary system; that the unquestioned international financial emergency justified and required such a restriction with respect to the unpaid portion of gold bonds; and that the substitution of paper payment for gold payment *only altered, and did not destroy, the rights of the bondholders.*

It will be readily seen that the present case is totally dissimilar to the gold clause case. Concededly, the Portal-to-Portal Act is valid with respect to employment after its date, just as the gold legislation was held valid with respect to payments coming due in the future. Future activities under continuing contracts within the general area of congressional control have, as the court pointed out, a "congenital infirmity", *i. e.*, they are subject to change with respect to the unexecuted portion. If this were not so, the effect "would be to place to this extent the regulation of interstate commerce in the hands of private individuals."

Again, in the present case the rights of the petitioners are not merely impaired: they are totally and irrevocably destroyed. When this is done, even for a public purpose, the Fifth Amendment requires that compensation be paid:

> "If the public interest requires and permits the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that through taxation, the burden of relief afforded in the public interest may be borne by the public."
>
> *Louisville Bank* v. *Radford,* 295 U. S. 555, 602, 79 L. Ed. 1594, 1611.

The principal case relied upon by the Court below to support its view that vested rights are subject to destruction under the congressional power to regulate commerce is *Louisville and Nashville Railroad* v. *Mottley,* 219 U. S. 467,

55 L. Ed. 297, where a claim against the railroad was settled in return for a contract by the railroad to furnish free transportation to the claimant during his lifetime. Later, a congressional enactment invalidating such contracts, both prospectively and retrospectively, was upheld. However, this Court was careful to reserve decision on the question whether the statute conclusively deprived the claimant of his vested right or merely eliminated one of the remedies available to him:

> "Whether, without enforcing the contract in the suit, the defendant in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the collision occurred, is a question not before us, and we express no opinion on it."

In a later similar case, this Court had occasion to pass on this precise point and held that the basic rights of the claimant had not been (and presumably could not have been) destroyed by the legislative enactment:

> "In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to the defendant in error in performance of the contract of November, 1900. But from this it by no means follows that it could refuse to make just compensation in money for the unpaid purchase price of the maps."
>
> *New York Central R. R.* v. *Gray*, 239 U. S. 583, 586.

Finally, the Portal-to-Portal legislation will not pass the judicial inquiry which must always be made, both as to the existence of the emergency and the reasonableness of the means chosen to meet it:

> "When the legislature acts directly, its action is subject to judicial scrutiny, and determination in order to prevent the transgression of these" (constitutional) "limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legis-

lative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

St. Joseph Stockyards Co. v. *United States,* 298 U. S. 38, 51, 52, 80 L. Ed. 1033, 1041.

When such a scrutiny is made here, it is abundantly clear that no emergency in fact existed. In the very case which aroused the interest of Congress (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 90 L. Ed. 1515), this Court was careful to point out that the facts and liabilities of each particular case should be determined in the light of the familiar *de minimis* rule. Following that opinion, and before the passage of this Act, the trial court in the same case had followed this rule and dismissed the particular case entirely (*Anderson* v. *Mt. Clemens Pottery Co.,* 69 F. Supp. 710). It is certain, therefore, that no "wholly unexpected liabilities, immense in amount," would "bring about financial ruin of many employers" (Portal-to-Portal Act, Sec. 1).

In this connection, we feel it proper to call the Court's attention to the economic basis of our claim that no real emergency of any kind was present when the Portal-to-Portal Act became law. Although there is a presumption of constitutionality, that presumption may be rebutted (*Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 75, 81 L. Ed. 510, 521.) Where the constitutionality is so challenged, the court has the power and the responsibility of determining for itself whether there was sufficient public purpose to justify depriving certain employees of compensation claims against their employers (*Hairston* v. *Danville & Western Ry.,* 208 U. S. 598, 52 L. Ed. 637), and whether the facts allegedly supporting the legislation really existed (*Treigle* v. *Acme Homstead Asso-*

ciation (1936), 297 U. S. 189, 80 L. Ed. 575); (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322.)

The coverage of the Fair Labor Standards Act in 1945 involved about 21,000,000 workers (House Report No. 71 (Feb. 25, 1947) on Portal-to-Portal Act). From the reports of the Administrative Office of the United States, it appears that there were 1913 portal cases filed in the Federal District Courts. Of this number, 298 cases did not claim a definite amount and the balance of the cases claimed $5,785,-204,606.00 (House Report 71, *supra*).

A study of a list of companies involved in these actions reveals that 52 companies employing approximately 2.2 million workers accounted for approximately $2,700,000,-000.00 of these claims (See Morse, *Economic Aspects of Portal-to-Portal*, 7 Lawyers Guild Review 29). It is apparent from these figures that a small minority of employers covered by the Act were involved in portal claims, and it is a fair inference that the great majority of employers and employees concerned had complied with the Fair Labor Standards Act as construed by this Court. When it is considered that in 1946 and 1947 the total number of wage and salary workers employed in non-agricultural establishments averaged 42¾ million and 42½ million respectively (Economic Report of the President, Jan. 1948, P. 116), the limited scope of the portal problem in terms of numbers of workers of the country is clearly seen.

The financial effects of the sums involved in these portal suits are greatly exaggerated. First of all, it is clear that the large sums for which the suits were filed do not furnish a reasonable basis for the anticipated recoveries (Hearings on S. 70, at P. 303; *Morse, supra*, at P. 31). The application of the *de minimis* rule (*Anderson* v. *Mt. Clemens Pottery Co.*, 69 F. Supp. 710), the effect of the short period of limitations of many state statutes which have been sustained (*Ott* v. *Freeman & Son, Inc.*, 68 F. Supp. 445—one year stat-

ute upheld) and the possibility of reasonable settlements such as was recently reported in the *Dow Chemical Company* case (50th Annual Report, Dow Chemical Company), would also limit the actual recoveries. It is a generally known fact that hundreds of these actions have been withdrawn since the report of the Administrative Office, through settlement or by collective bargaining.

However, even assuming that the full amount alleged to be due were recovered by the employees involved, there is not a financial problem of such magnitude as to make it a matter of national concern and justify the exercise of the Congressional power to relieve the particular employers involved in these suits. The five billion dollars sued for involve claims which, in the main, accrued during the years 1941 to 1946. Spokesmen for the Internal Revenue Department estimated that sixty percent of this liability would be offset by tax refunds and that the net burden on the Treasury would be reduced to forty to forty-five percent by collection of income taxes from the workers receiving the payments. (Statement of J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, to Senate Judiciary Committee—*Morse, supra,* P. 30.) When it is realized that total compensation paid to employees for the year 1946 was 116 billion, and for the year 1947—128 billion, and that for the period 1941-1946 such compensation totalled 619 billion dollars (Economic Report of the President, *supra,* P. 110), for the seven-year period a total of 747 billion dollars, the insignificance to our national economy of even the total alleged claims becomes clear.

Although these portal claims would not reduce corporate profits directly in view of the tax rebates and possible payments from corporate reserves, it is of interest to note the amount of corporate profits during the period under consideration. Before taxes, corporate profits averaged from 17 billion in the year 1941 to 28 billion in the year 1947

(President's Report, *supra*, 119). Recently published earnings statements of the defendant herein indicate that profits for the year 1947 reached $288 million.

National City Bank's *Monthly Letter* for March 1948, contains a report of corporate earnings of 960 leading American manufacturing corporations. That publication states that 1947 net income after taxes was 50.2% higher than in 1946. For the automotive industry, in particular, 1947 profits were 581% greater than in 1946. It is perfectly plain that no possible result of these particular lawsuits could affect the complete solvency of this defendant.

Again, section 1 of the Act recites that the portal claims were "wholly unexpected liabilities." The same claim might be made about every decision which was not "expected" by the unsuccessful litigant. If this reasoning is now to receive judicial approval, a similar claim may be sanctioned as a result of the decision in *U. S.* v. *Paramount Pictures, Inc.*, 333 U. S. 131. Was this decision "unexpected" any more than the portal decision? Is Congress now to be given *carte blanche* to legislate the *Paramount* decision out of existence and therefore to do likewise in every case the decision in which the Congress disapproves?

The fact is, moreover, that these portal liabilities were clearly anticipated by decisions of the Supreme Court (*Tennessee Coal and Iron Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 88 L. Ed. 949; *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U. S. 161, 89 L. Ed. 1534) and by a long series of official interpretations of the Fair Labor Standards Act (*e.g.* Wage-Hour Interpretative Bull. No. 13, issued May, 1939; W-H Release G-133).

Obviously, not even Congress believed the dire forebodings recited as justifying the Act. In Point IV, *infra*, we point out that Congress attempted to outlaw only "portal to portal" claims of a non-contractual nature existing on the date of passage of the Act, while permitting enforce-

ment of identical claims arising the very next day. Here is a strange emergency indeed—an emergency so acute that Congress in one and the same statute expressly authorizes the maintenance in the future of causes of action identical with those accruing in the past which, it is claimed, must be banned in order to save industry from financial ruin.

By the same token, it must be clear that the means selected by Congress are unreasonable and illegal as a matter of law, even if the court should find justification for the declaration of an emergency. As is pointed out in the *Radford* case, *supra*, if vested rights are to be destroyed for the benefit of the public, the public must pay compensation. Here, beyond any doubt, such rights are abolished entirely, and all remedy for their enforcement is taken away. At the same time, identical rights in the future are aproved and validated. Thus, the entire financial burden of the legislation falls not upon the public, nor even upon all employees alike, but simply upon those employees whose statutory rights had been violated prior to May 14th, 1947. So far as we can determine, no court has ever held that any emergency could justify such arbitrary and discriminatory action.

Point IV

The portal-to-portal Act violates Article III, Section 1, of the Constitution by attempting to control the decision of pending cases through an exercise of the judicial power reserved to the courts.

In discussing the clear delineation of the powers of the judicial branch of the federal government set forth in Article III, Section 1 of the Constitution, this Court said in *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. Ed. 377:

> "If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial

power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred." (p. 192 of the U. S. report.)

(The specific exceptions referred to include contempt proproceedings, impeachment, etc.)

Does the Portal-to-Portal Act invade the province of the judiciary? In order to answer this, we turn first to two clear expositions of the term "judicial power" by this Court. Both opinions are by Mr. Justice Holmes:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." (p. 137, U. S. report.)
> *James* v. *Appel,* 192 U. S. 129, 48 L. ed. 377.

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."
> *Prentis* v. *Atlantic Coastline Co.,* 211 U. S. 210, 226, 53 L. ed. 150, 158.

The foregoing principles and definitions make the answer to our inquiry clear. Again, the intention of the legislature is not left to speculation. The preamble specifically aims the Act at the courts. We quote from Sec. 1 (a):

> "The Congress hereby finds that the Fair Labor Standards Act of 1938 as amended, has been interpreted judicially in disregard of long established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities enormous in amount and retroactive in operation

upon employers with the results that, *if said Act as so interpreted for claims arising under such interpretations were permitted to stand,* * * *" (Emphasis ours).

Applying the definition of the *Prentis* case to the Portal-to-Portal Act, it will be seen that it attempts to perform an exclusively judicial funcion in that it "declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."

This type of activity is forbidden to Congress by the Constitution, and the Supreme Court has not hesitated to invalidate legislation of this kind. We quote from the decision of this court in *U. S.* v. *Klein,* 13 Wallace 128, 20 L. Ed. 519, invalidating a statutory withdrawal of jurisdiction from the Supreme Court in a pending case:

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the court of claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it? * * *
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

Only three years ago, this court, in *Pope* v. *U. S.* 323 U. S. 1, 89 L. ed. 3, referred approvingly to the *Klein* case and distinguished it from the case then under consideration:

> "* * * we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case." (p. 9, U. S. report.)

We now invite the court's attention to an even more specific vice of the Portal-to-Portal Act with respect to its usurpation of judicial power. We refer to the distinction made between existing and future claims, which was mentioned briefly under Point III, *supra*. It can be demonstrated beyond argument that the court would have jurisdiction of the claims stated in the present complaint, even under the Portal-to-Portal Act, if the liability asserted had arisen after the passage of the legislation. In other words, under the rule of decision enacted by Congress, particular cases are singled out for discrimination and the rights involved are utterly destroyed (i.e., those arising before enactment), while identical claims arising after enactment are preserved intact. Congress has thus constituted itself judge and jury in disposing of these particular claims, in the plainest possible violation of Article III, Sec. 1.

To elucidate this discrimination, we turn first to Sec. 2 which bans all existing claims which are not based upon either "an express provision of a written or unwritten contract" (Sec. 2(a) 1), or upon "a custom or practice in effect at the time of such activity," (Sec. 2(a) 2).

On the other hand, Sec. 4, which deals with future claims, does not require any such provision of contract or custom as a condition precedent to liability, but permits recovery for all activities except those "preliminary to or postliminary to said principal activity or activities". The meaning of this distinction is clarified both in the congressional debates and in President Truman's message approving the Act. Senator Cooper, who managed the bill, made the following statement with respect to past claims:

> "I have explained that the reason for that is that *in order definitely and surely to relieve against past claims, a stricter rule was adopted.*" (Emphasis ours).

He was then asked by Senator Ellender:

> "Was not virtually the same rule adopted as to future claims?"

To which he answered:

"I think not." (Cong. Rec. 3-20-47; p. 2374). He then proceeded to point out the obvious fact that all "principal activity", as that term might be defined by the administrator of the Act, or by the courts, would be compensable in the future regardless of contract or custom, while such activity could not be used to sustain a past claim unless it had been the subject of a specific contract or custom.

In referring to the treatment of *future* claims under the Act, President Truman stated in his message of approval:

> "We should not lose sight of the important requirement under the Act that all 'principal activities' must be paid for, regardless of contract, custom or practice."

The same authorities clarify the meaning of the term "principal activities." President Truman again pointed out that the legislative history of the Act shows that the term is "to be construed liberally to include any work of consequence performed for the employer no matter when the work is to be performed."

The congressional debates make it clear that such activities, as changing clothes and preparing machines, when required by the nature of the work, constitute "principal activity" and are compensable in the future regardless of contract or custom. The Senate committee report gives as an example of "principal activity" the oiling and cleaning of machinery before commencing work. In the debates on the floor, Senator Cooper, in reply to a question

by Senator McGrath, specifically stated that time required for changing clothes and bathing in a chemical factory would be considered a part of "principal activity." (See *Special Analytical Report on Portal-to-Portal Act,* issued by the Bureau of National Affairs, particularly at pgs. 34 and 35; Cong. Rec., 3-20-47; pg. 2375.)

It is thus abundantly clear that the very activities detailed in paragraph "Third" of the complaints, for which recovery is sought in the present actions, are in fact "principal activity" for which recovery would necessarily be allowed if the work had been done after May 14, 1947, the date of approval of the Act. This discrimination between identical cases, and decision of particular cases, is purely and exclusively a judicial function reserved to the courts, as is shown by the quotations above.

We also wish to call the court's attention to a case decided by the Supreme Court of Arizona in which the legal principles involved are on all-fours with those here considered. The case is *Puterbaugh* v. *Gila County,* 46 Pac. 2nd 1064. In that case, the defendant, as a member of the county board of supervisors, obtained money for travelling expenses from the county treasurer, in violation of a statute. The same statute permitted the county to bring an action to recover such payments. While the action was pending, a new statute was passed which, by its express terms, purported to continue the former law in force, but forbade the maintenance of any action against a county officer for payments made prior to a specified date. The analogy to the present case is complete, since existing claims were destroyed but future claims approved. The defendant asserted that since the Legislature had created the cause of action, it could subsequently modify or repeal it. However, the court held that such discriminatory action invaded the province of the judiciary, and therefore invalidated the subsequent statute. We quote from the opinion:

"If the Legislature has given a right of action, it may, of course, unless prevented by some constitutional provision, repeal the law which gives that right of action, so long as rights have not vested thereunder and if the right of action itself fails, naturally the remedy fails with it. But where, as in the present case, the Legislature has not tried to take away the right of action itself, and indeed has expressly, by Chapter 74 *supra*, continued in force the provisions of the Act which gave that right, and merely attempts to prohibit the Court from hearing certain particular suits brought by virtue of those sections, we are of the opinion that it is clearly an attempted invasion by the Legislature of the functions of the Judicial Branch of the Government."

On the basis of these authorities, it is respectfully submitted that the Portal-to-Portal Act of 1947 must be held invalid as an attempted exercise of judicial power by the legislative branch of the government.

Last Point

It is respectfully submitted that the petition should be granted and that writs of certiorari be issued to the Court of Appeals for the Second Circuit.

Respectfully submitted,

Manly Fleischmann,
David Diamond,
Counsel for Petitioners.

APPENDIX

Statutes and Constitutional Provisions Involved

Portal-to-Portal Act of 1947:

#1 "(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous, uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost

to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State and Local governments would occur. * * * "

#2 "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee over-time compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which the employer employed an employee there shall be counted all that time, but only that time, during which the employee

engaged in activities which were compensable within the meaning of subsection (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

#4 "(a) Except as provided in subsection (b2), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

Fair Labor Standards Act of 1938:

#7 "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

#16("(b) Any employer who violated the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees similarly situated, or such employee or employees may designate an agent or

representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Constitution of the United States:

ARTICLE III

Section 1: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *"

Fifth Amendment:

"No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

BATTAGLIA, et al., etc., Petitioners, v. GENERAL MOTORS CORPORATION, Respondent.	No. 320
HOLLAND, et al., etc., Petitioners, v. GENERAL MOTORS CORPORATION, Respondent.	No. 321
HILGER, et al., etc., Petitioners, v. GENERAL MOTORS CORPORATION, Respondent.	No. 322
CASHEBA, et al., Petitioners, v. GENERAL MOTORS CORPORATION, Respondent.	No. 323

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The District Court opinion was filed December 15, 1948, (R. 37-53) and is reported in 74 Fed. Supp. 274. The opinion of the Court of Appeals was filed July 8, 1948, (R. 69-82) and is reported in 169 Fed. 2d 254.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code as amended by the Act of June 25, 1948, (Public Law 773; c. 646). The judgments of the Court of Appeals were entered July 8, 1948 (R. 82). The petition was filed on September 29, 1948.

QUESTIONS PRESENTED

Congress found that the retroactive enforcement of Section 7 (a) of the Fair Labor Standards Act construed as requiring compensation for "portal-to-portal" activities regardless of any contract, custom or practice to the contrary, constituted a substantial burden on commerce and the courts. To remove such burdens, Congress enacted the Portal-to-Portal Act of 1947. Section 2 of the Act was construed by the lower courts as requiring that a complaint based on Section 7 (a) of the Fair Labor Standards Act and seeking recovery under Section 16 (b) of that Act for "portal-to-portal" activities engaged in prior to the effective date of Section 2 of the Portal Act, must allege the facts required by Section 2 in order to state a cause of action and to establish jurisdiction. The facts to be alleged are that a contract, custom or practice to pay for the activities existed between the employee and the employer at the time that the activities were engaged in.

1. Is Section 2 of the Portal Act, as so applied, unconstitutional because it abrogates rights which are protected by the Fifth Amendment to the Constitution?

2. Is Section 2 of the Portal Act, as so applied, unconstitutional because it is an attempt by Congress to interfere with the powers granted the judiciary under Article III, Section 1 of the Constitution?

STATUTES INVOLVED

The appendix to petitioners' brief sets forth only the initial portion of Section 1 (a) of the Portal Act. It is believed that all of Section 1 of the Act should be brought to the attention of the Court. For the Court's convenience, therefore, the full text of Section 1 and Section 2 (a)-(d) of the Act are reprinted in Appendix A to this brief.

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the petition:

(1) There is complete unanimity of opinion in numerous lower federal courts and in all of the Courts of Appeals that Section 2 of the Portal Act is a constitutional exercise by Congress of its power over commerce. Unless this Court feels that this unanimous conclusion is open to question, this Court's consideration of the issue is not necessary to settle the status of pending cases.

(2) Had the Court of Appeals agreed with the petitioners' contention that the Section violates the Fifth Amendment, the decision would clearly have been in conflict with the decisions of this Court regarding the power over commerce granted Congress by the Constitution.

3. Had the Court of Appeals agreed with the petitioners' contention that the Section constitutes an interference with the judiciary, the decision would clearly have been in conflict with the decisions of this Court regarding the power over the jurisdiction of inferior courts granted Congress by the Constitution.

ARGUMENT

Point I.

NUMEROUS DISTRICT COURTS HAVE UNANIMOUSLY UPHELD THE CONSTITUTIONALITY OF SECTION 2 OF THE PORTAL ACT. THE THREE CIRCUIT COURTS TO WHICH APPEALS FROM SUCH DECISIONS HAVE BEEN TAKEN HAVE UNANIMOUSLY AFFIRMED ON IDENTICAL GROUNDS

There are numerous "portal-to-portal" cases in which the same contentions under the Constitution that are now made by the petitioners were presented to and considered by lower federal courts. Not one of these cases has come to the attention of Respondent's counsel in which the contentions were accepted by the court.

Counting only decisions in which opinions were written and reported, a total of fifty-two federal district judges sitting in thirty-three federal districts in all ten federal circuits have granted defendants' motions to dismiss under Section 2 of the Portal Act in almost two hundred "portal-to-portal" actions. See Appendix B *infra*, which contains a summary and a list of such dismissals by federal district and judge.* In each instance, the complaint sought recovery for activities engaged in prior to the effective date of the Portal Act. In each instance, the motion was based on the failure of the complaint to allege the facts required by Section 2 of that Act. In each

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* Appendix C *infra* contains a similar summary and list of the dismissal of more than one hundred unreported cases which have been brought to the attention of Respondent's counsel. Appendix D *infra* contains a summary of both the reported and unreported dismissals by federal circuit and district.

instance, the court found Section 2 of the Act constitutional.

Five appeals from the dismissals of eight such cases were perfected and decided—two in the Fourth Circuit; one in the Second Circuit and two in the Sixth Circuit. In each case the court unanimously affirmed the dismissal on the ground that Section 2 of the Portal Act was within the power over commerce granted Congress by the Constitution. *Seese v. Bethlehem Steel Co.* (CCA 4th, May 5, 1948) 168 Fed. 2d 58; *Atallah v. Hubert & Son* (CCA 4th, July 7, 1948) 168 Fed. 2d 993; *Battaglia, et al. v. General Motors Corporation* (4 cases), (CCA 2d, July 8, 1948) 169 Fed. 2d 254; *Fisch, et al. v. General Motors Corporation* and *Bateman, et al. v. Ford Motor Company* (CCA 6th, August 2, 1948) 169 Fed. 2d 269.

Two state supreme courts have similarly found Section 2 of the Portal Act constitutional on the same ground. *Werner v. Milwaukee Solvay Coke Company* (Wis. S. C. March, 1948) 252 Wis. 392; 31 N. W. 2d 605; *Kemp v. Day & Zimmerman* (Iowa S. C. June, 1948) —— Iowa ——; 33 N. W. 2d 569; 8 W. H. cases 78.

The petition cites without comment, three district court cases in support of the statement that "many doubts" have been expressed "as to the propriety and constitutionality of the Act" (p. 6 of the petition).

In two of the three cases, the courts granted the defendants' motions to dismiss the complaints after finding that Section 2 of the Portal Act is constitutional. *Cochran v. St. Paul & Tacoma Lumber Co.*, W. D. Wash., May 26, 1947, 73 Fed. Supp. 288; *Boehle v. Electric Metallurgical Co.*, Ore., June 9, 1947, 72 Fed. Supp. 21. In the third case (*Sveltik v. Vultee Aircraft Corp.* (N. D. Tex., 1947) 16 U. S. Law Week 2161; 7 W. H. Cases 282) the court deferred the question without consideration:

> "I could learn a whole lot more by reading your briefs; I will admit that. But for the present I overrule defendant's plea to the jurisdiction * * *"

The petition also cites without comment, the decisions of two Courts of Appeals in support of the statement that "there is no unanimity of opinion on the basis of the decisions" in the circuit courts (p. 6 of the petition). The brief in support of the petition does not set forth the alleged conflict. The reason is obvious; none exists. All the decisions of the Courts of Appeals agree that the Act is within the power over commerce granted Congress.

One of the cases cited by the petition (*Rogers Cartage Co. v. Reynolds,* CCA 6 Feb., 1948, 166 Fed. 2d 317) involved the constitutionality of Sections 9 and 11 of the Portal Act. The court found both sections constitutional on the ground that they were within the commerce power.

> "Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights." The rights asserted here "are purely the creature of statute." 166 Fed. 2d at 320-321.

In *Darr v. Mutual Life Insurance Co.* (CCA 2, July, 1948) 169 Fed. 2d 262 (not cited by the petition) the constitutionality of the same sections of the Act was questioned. The Court of Appeals for the Second Circuit came to the same conclusion on the same ground:

> "We hold, therefore, as did the Sixth Circuit in *Rogers Cartage Co. v. Reynolds,* 166 F. 2d 317, that, even if appellants' rights are considered as contractual, these two sections are a valid exercise of the constitutional power of Congress to legislate in the field of interstate commerce * * *." 169 Fed. 2d at 266.

The second case cited by the petition to support the claim that there is no unanimity of opinion in the circuit courts (the *Seese* case, *supra*), is one of the four Court of Appeals' decisions all of which specifically decided that Section 2 of the Portal Act is a constitutional exercise by Congress of its power over interstate commerce.

In the *Seese* case the Court of Appeals for the Fourth Circuit stated:

> "The answer is that even rights arising out of contract cannot fetter Congress in the exercise of a power granted it by the Constitution and that the rights stricken down by the statute are not rights arising out of contracts at all but rights created by statute as an incident of the statutory regulation of commerce." 168 Fed. 2d at 62.

On July 7, 1948, the same court in a *per curiam* opinion affirmed a similar dismissal on the same grounds. *Atallah v. Hubert & Son,* 168 Fed. 2d 993; cert. denied, November 15, 1948.

The Court of Appeals for the Second Circuit in affirming the dismissal of the present four cases stated:

> "We find ourselves, then, in agreement with the decision of the Circuit Court of Appeals for the Fourth Circuit in Seese v. Bethlehem Steel Co., 4 Cir., 168 F. 2d 58." R. 82, 169 Fed. 2d at 262.

The Court of Appeals for the Sixth Circuit in affirming the similar dismissal of two cases by the five district judges sitting *en banc* in the Eastern District of Michigan, reached the same conclusion (*Fisch v. General Motors Corporation; Bateman v. Ford Motor Company,* 169 Fed. 2d at 271):

> "The proposition that their rights granted by the Congress under the commerce clause could not be

taken away by the congressional legislation under the same clause, is self-contradictory.

"Rights secured even by private contract may be abrogated by subsequent legislation when authorized by constitutional provisions."

All three Courts of Appeals specifically rejected the contention that Section 2 of the Portal Act constitutes an interference with the powers granted the judiciary under Article III, Section 1 of the Constitution. *Seese* case, 168 Fed. 2d at 62; *Battaglia* case, R. 81-82, 169 Fed. 2d at 261-262; *Fisch* case, 169 Fed. 2d at 272.

It is clear that all of the large number of lower federal courts and all of the three Courts of Appeals which have passed on the contentions made by the petitioners unanimously agree that Section 2 of the Portal Act as construed by the lower court does not violate the Constitution.

Unless this Court feels that the conclusion is open to question, consideration by this Court of the contentions made by the petitioners is not necessary to settle the status of similar claims still pending in the courts.

Point II.

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT REGARDING THE POWER TO REGULATE COMMERCE GRANTED CONGRESS BY THE CONSTITUTION

The broad scope of the plenary power granted Congress by the commerce clause has been clearly indicated in a number of recent decisions by this Court.

In *U. S. v. Darby* (1941) 312 U. S. 100, in upholding the constitutionality of the Fair Labor Standards Act, which involved the same form of activity in commerce as is affected by the Portal Act, Justice Stone stated:

> "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.' *Gibbons v. Ogden, supra,* 196.
>
> "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." 312 U. S. at 114-115.

See also: *Labor Board v. Jones and Laughlin* (1937), 301 U. S. 1, 36-37; *North American Co. v. S. E. C.* (1946), 327 U. S. 686, 705-706; *American Power & Light Co. v. S. E. C.* (1946), 329 U. S. 90, 99, 103-104.

The rights and remedies which the petitioners sought to enforce under the Fair Labor Standards Act have been described by this Court as statutory. See: *Overnight Motor Co. v. Missel* (1942), 316 U. S. 572, 574; *Tennessee Coal, Iron and R. R. Co. v. Muscoda Local* (1944), 321 U.

S. 590, 602, 603; *Jewel Ridge Corp. v. UMW* (1943), 325 U. S. 161, 167.

This Court has held that these rights could not be waived because they are statutory rights conferred on private parties in the public interest and in the furtherance of a Congressional policy for the regulation of commerce. *Brooklyn Savings Bank v. O'Neil* (1944) 324 U. S. 697, 704.

The rights affected by the Portal Act are only those rights which are based solely on the Fair Labor Standards Act.

This Court has repeatedly held that even purely private contractual rights cannot fetter the plenary powers granted Congress by the Constitution. In *Louisville and Nashville R. R. Co. v. Mottley* (1911) 219 U. S. 467, 482, this Court said:

> "That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

See also: *Norman v. Baltimore & Ohio R. R. Co.* (1935), 294 U. S. 240; *Fleming v. Rhodes* (1947), 331 U. S. 100, 109; *Addyston Pipe & Steel Co. v. U. S.* (1899), 175 U. S. 211, 228-230.

Since contractual rights have a "congenital infirmity" when they relate to a subject matter that lies within the control of Congress (*Norman v. B. & O. R. R. Co.*, 294 U. S. at 307) clearly rights and remedies conferred by Congress for the specific purpose of fostering commerce are subject to defeasance when Congress finds that their immediate withdrawal is necessary to prevent great injury to commerce.

The petitioners have attacked the motives and conclusions of Congress in the enactment of the Portal Act.

This Court has repeatedly warned that it is not its function to re-examine the conclusions of Congress or the policy and remedies adopted by Congress in the exercise of its constitutional powers. In the *Darby* case, *supra*, Justice Stone stated:

> "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the Courts are given no control. *McCray v. U. S.*, 195 U. S. 27; *Sonzinsky v. U. S.*, 300 U. S. 506, 513 and cases cited. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." 312 U. S. at 115.

See also: *American Power & Light* case, *supra*, 329 U. S. at 90, 106-107; *Sunshine Coal Co. v. Adkins* (1940), 310 U. S. 381, 394.

This Court denied certiorari in a recent case that involved facts analogous to the facts involved in the present petition. *National Car Loading Corp. v. Phoenix-El Paso Express* (1943) 142 Texas 141, 176 S. W. 2d 564, cert. den. 322 U. S. 747.

The Court of Appeals therefore held in conformance with the decisions of this Court in deciding that rights created by Congress under its commerce power were subject to withdrawal by Congress in the further exercise of such power.

The petition lists four decisions of this Court in support of the contention that the decision of the Court of Appeals erroneously held that there was no violation of the Fifth Amendment (pp. 6-7 of the petition).

None of these four decisions involved the exercise by Congress of its power over commerce.

Three of these four decisions involved state enactments. *Pacific Mail Steamship Co. v. Joliffe* (1864) 2 Wall. 450; *Ettor v. City of Tacoma* (1913) 228 U. S. 148; and *Coombes v. Getz* (1932), 285 U. S. 434. None of these enactments were passed in the exercise of the state's police power which would be necessary to make them in any way analogous to the present statute. See: *U. S. v. Darby*, p. 10 *supra*. None of the enactments reflected a conclusion by the legislature that the termination of the rights granted by the prior enactment was necessary.

In the *Joliffe* case the court emphasized that the plaintiff changed his position in reliance on the statutory provision and that the form of the new statute clearly indicated no intention in the legislature to cut off rights created under the prior statute. This was a four to three decision, the minority maintaining that the statutory right fell even though the legislature did not show in the new statute any intention to cut off the right under the prior statute. The *Coombes* case (a five to three decision) involved similar considerations with the three dissenting Justices (Cardozo, Brandeis and Stone) taking the same position as was taken by the minority in the *Joliffe* case. In the *Ettor* case, the court held that the city could not repudiate its obligation to pay damages resulting from grading authorized by statute on that condition, solely because of the subsequent repeal of the statute.

The fourth case cited by the petition (*U. S. v. General Motors Corporation* (1944), 323 U. S. 373) involved a question entirely foreign to the present questions:

> "The problem involved is the ascertainment of the just compensation required by the Fifth Amend-

ment of the Constitution, where in the exercise of the power of eminent domain, temporary occupancy of a portion of a leased building is taken from a tenant who holds under a long term lease. * * * The award was therefore limited to the market value of the occupancy of a vacant building. The question is whether any other element of value inhered in the interest taken." 323 U. S. at 374, 379.

Point III.

THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT REGARDING THE POWER TO REGULATE THE JURISDICTION OF INFERIOR COURTS GRANTED CONGRESS BY THE CONSTITUTION

The derivation and scope of the jurisdiction of all inferior federal courts has been described in this Court's decision in *Lockerty v. Phillips* (1943) 319 U. S. 182, 187:

> "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"

This Court has further stated in *Kline v. Burke Construction Co.* (1922) 260 U. S. 226, 234, that:

> "And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors v. Osbornes,* 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."

In *United States v. United Mine Workers of America* (1947), 330 U. S. 258, Justice Rutledge (in a dissent from a holding involving other questions) summarized the holdings of this Court on that question as follows:

> "And where Congress has acted expressly to exclude particular subject matter from the jurisdiction of any court, except this Court's original jurisdiction, I know of no decision here which holds the exclusion invalid, * * *" 330 U. S. at 351.

The petitioners contend that Section 2 of the Portal Act constitutes an invasion of the powers granted the judiciary under Article III Section 1 of the Constitution (p. 2 of the petition).

The Portal Act is expressly based on the acceptance by Congress of this Court's construction of Section 7 (a) of the Fair Labor Standards Act and Congress' finding that Section 7 (a), as so construed, created conditions inimical to commerce and the operation of the courts. Section 1 of The Portal Act, Appendix A, *infra*. Congress concluded that to remedy these conditions it was necessary to enact Section 2 of the Portal Act which, *inter alia*, withdraws from inferior courts part of the jurisdiction that Congress had previously conferred on such courts under The Fair Labor Standards Act.

The petition lists four cases to support the contention that the decision of the Court of Appeals conflicts with the decisions of this Court on that question (p. 7 of the petition).

None of the four cases is applicable. *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519, involved an attempt by Congress to interfere with pardons granted by the President in pursuance of his powers under Article II Section 2 of the Constitution:

> "Its great and controlling purpose is to deny to pardons granted by the President the effect which this court adjudged them to have." 13 Wall. at 145.

Kilbourn v. Thompson (1880) 103 U. S. 168, involved the question whether Congress had constitutional authority to punish a witness for contempt. In *James v. Appel* (1903), 192 U. S. 129, it was held that a territorial statute providing for an automatic denial of a motion for new trial, if not ruled on by a judge during the term, did not constitute an interference with the judiciary and was not inconsistent with the grant by Congress of common law jurisdiction to the courts of the territory. In *Prentis v. Atlantic Coast Line* (1908) 211 U. S. 210, this Court (per Justice Holmes), held that though the proceedings fixing railroad rates appeared judicial in form they were in fact legislative. The action was remanded to await completion of the legislative process before allowing the railroad to attack the rates as confiscatory.

The decision of the Court of Appeals therefore is in clear accord with the decisions of this Court regarding the powers granted Congress under Article III Section 1 of the Constitution.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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Of Counsel.

November 19, 1948.

APPENDIX A

TEXT OF SECTION 1 AND SECTIONS 2(a)-(d) OF THE PORTAL-TO-PORTAL ACT OF 1947 (c. 52, PUBLIC LAW 49, MAY 14, 1947)

Section 1

"(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be en-

couraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Section 2(a)-(d)

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this act, except an activity which was compensable by either

"(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory or possession of the United States, or of the District

of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

APPENDIX B-1

SUMMARY OF DECISIONS BY DISTRICT COURTS DISMISSING "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT

District Court	District Judge	Total Cases Dismissed
First Circuit		
D. Mass.	Sweeney	17
Second Circuit		
W. D. N. Y.	Knight	6
S. D. N. Y.	Coxe	3
	Goddard	1
	Knox	1
	Clancy	16
	Hulbert	1
N. D. N. Y.	Brennan	1
D. Conn.	Hincks	3
Third Circuit		
E. D. Pa.	Kirkpatrick	1
	Follmer	1

District Court	District Judge	Total Cases Dismissed
W. D. Pa.	Gibson	43
D. N. J.	Meaney	1
	Forman	1
	Madden	3
Fourth Circuit		
D. Md.	Chesnut	1
Fifth Circuit		
N. D. Ga.	Russell	5
S. D. Tex.	Atwell	1
	Kennerly	1
N. D. Tex.	Atwell	1
Sixth Circuit		
E. D. Mich.	Picard, O'Brien, Lederle, Koscinski, Levin	2
N. D. Ohio	Jones	3
E. D. Tenn.	Darr	2
	Taylor	2
Seventh Circuit		
N. D. Ill.	Barnes	1
	Campbell	1
E. D. Ill.	Lindley	2
E. D. Wis.	Duffie	1
W. D. Wis.	Stone	2
Eighth Circuit		
D. Minn.	Donovan	3
	Nordbye	2
S. D. Iowa	Dewey	6
W. D. Mo.	Ridge	2
	Reeves	4
E. D. Mo.	Hulen	2

District Court	District Judge	Total Cases Dismissed
Ninth Circuit		
D. Mont.	Pray	1
D. Idaho	Clark	28
D. Ore.	McColloch	1
W. D. Wash.	Leavy	4
E. D. Wash.	Driver	1
N. D. Cal.	Roche, Goodman & Harris	5
	Goodman	1
S. D. Cal.	Yankwich	2
	Hall	1
	O'Connor	2
Tenth Circuit		
N. D. Okla.	Savage	1
E. D. Okla.	Rice	1
D. Kans.	Mellott	3
Total Districts	**Total Judges**	**Total Cases**
33	52	194

APPENDIX B-2

LIST OF DISTRICT COURTS' DECISIONS DISMISSING "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL-TO-PORTAL ACT OF 1947

First Circuit

MASSACHUSETTS

Moeller v. Eastern Gas & Fuel Associates, Sweeney, December 22, 1947, 74 F. Supp. 937.

NOT OFFICIALLY REPORTED

Millet v. Bethlehem-Hingham Shipyard (3 cases), Sweeney, June 4, 1948, 8 W. H. Cases 46.

Mitchell v. Boston Sausage Co. (11 cases), Sweeney, June 4, 1948, 8 W. H. Cases 49.

Finn v. Bethlehem Steel Co., Sweeney, June 4, 1948, 8 W. H. Cases 51.

Wiley v. Reece Corp., Sweeney, June 4, 1948, 8 W. H. Cases 52.

Second Circuit

NEW YORK—WESTERN DISTRICT

Battaglia, et al. v. General Motors Corporation (4 cases), Knight, December 15, 1947, 74 F. Supp. 274; affirmed July 8, 1948, 169 F. 2d 254.

Sinclair v. U. S. Gypsum Company, Knight, January 24, 1948, 75 F. Supp. 439.

NOT OFFICIALLY REPORTED

Donovan v. Republic Steel Corporation, Knight, January 22, 1948, 7 W. H. Cases 644; 14 C. C. H. Labor Cases, par. 64,295.

NEW YORK—SOUTHERN DISTRICT

Borucki, et al. v. Continental Baking Company, Coxe, November 7, 1947, 74 F. Supp. 815.

NOT OFFICIALLY REPORTED

Sochulak v. American Brake Shoe Company, Goddard, January 5, 1948, 7 W. H. Cases 584; 13 C. C. H. Labor Cases, par. 64,220.

Shaietvitz v. Laws, Knox, May 3, 1948, 7 W. H. Cases 975.

Markert and 699 others, & c. v. Swift & Co., Inc., et al., Coxe, November 12, 1947, 7 W. H. Cases 459, 13 C. C. H. Labor Cases, par. 64,145; Coxe, June 23, 1948, 8 W. H. Cases 159.

Bonner, et al. v. Elizabeth Arden, Inc., Coxe, November 22, 1947, 7 W. H. Cases 469, 13 C. C. H. Labor Cases, par. 64,147; Coxe, June 22, 1948, 8 W. H. Cases 68.

Lemme v. Caruso Foods, Inc. (fifteen cases), Clancy, January 17, 1948, 7 W. H. Cases 626.

Cook v. Industrial Rayon Corp., Clancy, June 23, 1948, 8 W. H. Cases 218.

Abernathy v. General Motors Corporation, Hulbert, May 8, 1948, 7 W. H. Cases 1027.

NEW YORK—NORTHERN DISTRICT

Cardinale, et al. v. General Motors Corporation, Brennan, October 25, 1947, 76 F. Supp. 743.

CONNECTICUT

Local 626, UAW-CIO v. General Motors Corporation (2 cases), Hincks, October 22, 1947, 76 F. Supp. 593.

Moeller, et al. v. Atlas Powder Company, Hincks, October 22, 1947, 76 F. Supp. 707.

Third Circuit

PENNSYLVANIA—EASTERN DISTRICT

Battery Workers' Union v. Electric Company, Kirkpatrick, January 30, 1948, 78 F. Supp. 947.

NOT OFFICIALLY REPORTED

Medrick v. Textile Machine Works, Inc., Follmer, July 20, 1948, 8 W. H. Cases 202.

PENNSYLVANIA—WESTERN DISTRICT

Hart v. Aluminum Company of America (forty-three cases), Gibson, October 8, 1947, 73 F. Supp. 727.

NEW JERSEY

Grazeski v. Federal Shipbuilding & Dry Dock Company, Meaney, April 16, 1948, 76 F. Supp. 845.

Hoyt v. Merritt-Chapman & Scott Corp., Madden, August 9, 1948, 79 F. Supp. 106.

Industrial Union v. New York Shipbldg. Corp. (2 cases), Madden, August 9, 1948, 79 F. Supp. 104.

NOT OFFICIALLY REPORTED

Hess v. E. I. duPont de Nemours & Company, Forman, July 9, 1948, 8 W. H. Cases 118.

Fourth Circuit

MARYLAND

Seese, et al. v. Bethlehem Steel Company, Chesnut, October 14, 1947, 74 F. Supp. 412; affirmed May 5, 1948, 168 F. 2d 58.

Fifth Circuit

GEORGIA—NORTHERN DISTRICT

May, et al. v. General Motors Corporation, Russell, October 17, 1947, 73 F. Supp. 878.

NOT OFFICIALLY REPORTED

Akins, et al. v. Firestone Tire & Rubber Company, Russell, October 17, 1947, 7 W. H. Cases 356.

Cassels, et al. v. General Motors Corporation, Russell, October 17, 1947, 7 W. H. Cases 355.

Glynn Metal Trades Council, et al. v. J. A. Jones Construction Company, Inc., Russell, October 17, 1947, 7 W. H. Cases 355.

Robison, et al. v. General Motors Corporation, Russell, October 17, 1947, 7 W. H. Cases 355.

TEXAS—NORTHERN DISTRICT

Burfiend v. Eagle-Picher Company, Atwell, May 21, 1947, 71 F. Supp. 929.

TEXAS—SOUTHERN DISTRICT

Story, et al. v. Todd Houston Shipbuilding Corporation, Kennerly, July 17, 1947, 72 F. Supp. 690.

Sixth Circuit

MICHIGAN—EASTERN DISTRICT

Fisch, et al. v. General Motors Corporation; Bateman, et al. v. Ford Motor Company, Picard, O'Brien, Lederle, Koscinski, Levin, February 27, 1948, 76 F. Supp. 178; affirmed August 2, 1948, 169 F. 2d 266.

OHIO—NORTHERN DISTRICT

Fajack v. Cleveland Graphite Company, Jones, July 23, 1947, 73 F. Supp. 308.

NOT OFFICIALLY REPORTED

Hassel v. Standard Oil Company, Jones, May 4, 1948, 8 W. H. Cases 41.

Smith v. Cleveland Pneumatic Tool Company, Jones, March 30, 1948, 7 W. H. Cases 855.

TENNESSEE—EASTERN DISTRICT

Lasater, et al. v. Hercules Powder Company, Darr, July 25, 1947, 73 F. Supp. 264.

Colvard, et al. v. Southern Wood Preserving Company, Darr, November 1, 1947, 74 F. Supp. 804.

NOT OFFICIALLY REPORTED

Young v. Kellex Corporation, Taylor, January 2, 1948, 7 W. H. Cases 562.

Jesse v. Tennessee Eastman Corporation, Taylor, May 6, 1948, 7 W. H. Cases 983.

Seventh Circuit

ILLINOIS—NORTHERN DISTRICT

NOT OFFICIALLY REPORTED

McCalpin v. Magnus Metal Corporation, Barnes, July 1, 1948, 8 W. H. Cases 120.

Bauler v. Pressed Steel Car Company, Campbell, May 27, 1948, 8 W. H. Cases 55.

ILLINOIS—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

Smith, et al. v. American Can Co., Lindley, January 12, 1948, 7 W. H. Cases 603.

Green, et al. v. Stokely Foods, Inc., Lindley, January 12, 1948, 7 W. H. Cases 603.

WISCONSIN—EASTERN DISTRICT

Ackerman, et al. v. J. I. Case Company, Duffy, November 4, 1947, 74 F. Supp. 639.

WISCONSIN—WESTERN DISTRICT

NOT OFFICIALLY REPORTED

Lee v. Hercules Powder Co. (2 cases), Stone, March 18, 1948, 8 W. H. Cases 247.

Eighth Circuit

MINNESOTA

Smith, et al. v. Cudahy Packing Company (3 cases), Donovan, September 15, 1947, 73 F. Supp. 141; December 12, 1947, 76 F. Supp. 575.

Plummer v. Minneapolis-Moline Power Implement Company, Nordbye, February 3, 1948, 76 F. Supp. 745.

NOT OFFICIALLY REPORTED

DeMaio v. Grant Storage Battery Company, Nordbye, February 3, 1948, 7 W. H. Cases 721; 14 C. C. H. Labor Cases, par. 64,285.

IOWA—SOUTHERN DISTRICT

NOT OFFICIALLY REPORTED

Hornbeck, et al. v. Dain Manufacturing Company (6 cases), Dewey, September 25, 1947, 7 W. H. Cases 295; 13 C. C. H. Labor Cases, par. 64,055.

MISSOURI—WESTERN DISTRICT

Sadler v. Dickey Clay Manufacturing Company, Ridge, September 30, 1947, 73 F. Supp. 690; Ridge, February 25, 1948, 78 F. Supp. 616.

Charles Breusing, et al. v. General Motors Corporation (Fisher Body Div., Kansas City Plant), Reeves, October 29, 1947, 74 F. Supp. 541.

Bumpus v. Remington Arms Company, Reeves, December 10, 1947, 74 F. Supp. 788; March 27, 1948, 77 F. Supp. 94.

Lockwood v. Hercules Powder Company, Ridge, February 16, 1948, 78 F. Supp. 716.

Tucker v. Pratt Whitney, W. D. Mo., March 25 1948, 77 F. Supp. 227.

NOT OFFICIALLY REPORTED

Hayes, et al. v. Hercules Powder Company, Reeves, November 1, 1947, 7 W. H. Cases 381; 13 C. C. H. Labor Cases, par. 64,123.

MISSOURI—EASTERN DISTRICT

Johnson, et al. v. Park City Consolidated Mines Company, Hulen, October 3, 1947, 73 F. Supp. 852.

NOT OFFICIALLY REPORTED

Horner, et al. v. McQuay Norris Manufacturing Company, Hulen, October 3, 1947, 13 C. C. H. Labor Cases, par. 64,086; 7 W. H. Cases 436.

Ninth Circuit

MONTANA

Role v. Neils Lumber Company, Pray, December 19, 1947, 74 F. Supp. 812.

IDAHO

Hollingsworth, et al. v. Federal Mining and Smelting Company (28 cases), Clark, December 12, 1947, 74 F. Supp. 1009.

OREGON

Boehle v. Electric Metallurgical Company, McColloch, June 9, 1947, 72 F. Supp. 21.

WASHINGTON—WESTERN DISTRICT

Cochran, et al. v. St. Paul and Tacoma Lumber Company (4 cases), Leavy, May 26, 1947, 73 F. Supp. 288.

WASHINGTON—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

Miller v. How Sound Mining Company, Driver, May 11, 1948, 8 W. H. Cases 1.

CALIFORNIA—NORTHERN DISTRICT

Alameda, et al. v. Paraffine Companies, Inc. (5 cases), Roche, Goodman and Harris, November 6, 1947, 75 F. Supp. 282.

Kirkham v. Pacific Gas & Electric Company, Goodman, December 22, 1947, 78 F. Supp. 658.

CALIFORNIA—SOUTHERN DISTRICT

Ditto v. Aluminum Company of America, Yankwich, June 9, 1947, 73 F. Supp. 955.

Quinn, et al. v. California Shipbuilding Corporation, Hall, September 29, 1947, 76 F. Supp. 742.

Devine et al. v. Joshua Hendy Corp., S. D. Calif., April 30, 1948, 77 F. Supp. 893.

NOT OFFICIALLY REPORTED

Felton v. Latchford Marble Glass Co., O'Connor, May 26, 1948, 8 W. H. Cases 53.

Tully v. Joshua Hendy Corp., O'Connor, July 28, 1948, 8 W. H. Cases 198.

Tenth Circuit

OKLAHOMA—NORTHERN DISTRICT

NOT OFFICIALLY REPORTED

Adkins v. E. I. duPont de Nemours & Company, Savage, September 26, 1947, 7 W. H. Cases 298; 13 C. C. H. Labor Cases, par. 64,025.

OKLAHOMA—EASTERN DISTRICT

NOT OFFICIALLY REPORTED

McDaniel v. Brown & Root, Inc., Rice, March 6, 1948; amended April 5, 1948, 7 W. H. Cases 978.

KANSAS

NOT OFFICIALLY REPORTED

Elting, et al. v. North American Aviation, Inc. (3 cases), Mellott, November 3, 1947, 7 W. H. Cases 491; 13 C. C. H. Labor Cases, par. 64,154.

APPENDIX C-1

SUMMARY OF UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT

District Court	District Judge	Total Cases Dismissed
Second Circuit		
D. Conn.	Smith	1
S. D. N. Y.	Conger	3
Third Circuit		
D. N. J.	Forman	1
	Meaney	5
		18
Fourth Circuit		
W. D. Va.		2
Fifth Circuit		
N. D. Tex.	Atwell	1
S. D. Tex.		1
S. D. Ala.	McDuffie	1

District Court	District Judge	Total Cases Dismissed
Sixth Circuit		
N. D. Ohio	Jones	6
S. D. Ohio	Nevin	2
	Druffel	12
W. D. Tenn.	Boyd	23
E. D. Ky.		1
Seventh Circuit		
N. D. Ill.	Campbell	2
	Sullivan	1
	Igoe	2
S. D. Ind.	Baltzell	8
W. D. Wis.	Stone	3
Eighth Circuit		
W. D. Mo.	Duncan	1
	Ridge	1
E. D. Mo.	Hulen	1
W. D. Ark.		1
E. D. Ark.		1
Ninth Circuit		
S. D. Cal.	Weinberger	1
	Hall	1
		1
Tenth Circuit		
D. Utah		13
D. Kans.	Mellott	6
Total Districts	**Total Judges**	**Total Cases**
21	21	120

APPENDIX C-2

LIST OF UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL ACT*

Second Circuit

CONNECTICUT

Walsh v. United States Aluminum Company, C. A. No. 1980, Smith, July 14, 1947.

NEW YORK—SOUTHERN DISTRICT

McKenna, et al. v. General Motors Corporation (Fisher Body Division), C. A. No. 39-554, Conger, March 22, 1948.

McKenna, et al. v. General Motors Corporation (Chevrolet Motor Division), C. A. No. 39-555, Conger, March 22, 1948.

McKenna, et al. v. General Motors Corporation (Eastern Aircraft Division), C. A. No. 39-556, Conger, March 22, 1948.

Third Circuit

NEW JERSEY

Zuccarello, et al. v. General Motors Corporation, C. A. No. 9481, Forman, April 26, 1948.

Amato, et al. v. General Motors Corporation, C. A. No. 9490, Meaney, April 14, 1948.

Saragino, et al. v. General Motors Corporation, C. A. No. 9437, Meaney, May 14, 1948.

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* This list is not complete. It included only those dismissals that have been brought to the attention of Respondent's counsel by local counsel.

Bruzaitis, et al. v. General Motors Corporation, C. A. No. 9474, Meaney, May 14, 1948.

Ackerson, et al. v. General Motors Corporation, C. A. No. 9509, Meaney, May 14, 1948.

Gawleck, et al. v. General Motors Corporation, C. A. No. 9402, Meaney, May 14, 1948.

Muche, et al. v. Electric Boat Co., C. A. No. 9113, May 14, 1948.

Armstrong, et al. v. Muller Metal Products, Inc., C. A. No. 9456, May 5, 1948.

Elliot, et al. v. Pittsburgh Plate Glass Co., C. A. No. 9467, April 28, 1948.

Elliot, et al. v. E. I. duPont de Nemours & Co., C. A. No. 9467, May 4, 1948.

Moselle, et al. v. Driver-Harris Co., C. A. No. 9480, May 13, 1948.

Eick, et al. v. Hercules Powder Co., C. A. No. 9484, May 13, 1948.

Int. Union, Local 713 v. General Motors Corporation, C. A. No. 9490, May 4, 1948.

Dichter, et al v. Aluminum Co. of America, C. A. No. 9492, April 29, 1948.

Workers v. General Motors Corporation, C. A. No. 9509, May 4, 1948.

Heimann, et al. v. Armour & Co., C. A. No. 9529, May 3, 1948.

Armstrong, et al. v. Wright Aeronautical Corp., C. A. No. 9530, May 11, 1948.

Mosele, et al. v. Tube Reducing Corp., C. A. No. 9538, May 11, 1948.

O'Shea, et al. v. National Battery Co., C. A. No. 9554, May 13, 1948.

Barnes, et al. v. E. I. duPont de Nemours & Co., C. A. No. 9652, May 4, 1948.

Froesch, et al. v. Pittsburgh Plate Glass Co., C. A. No. 9682, April 29, 1948.

Barclay, et al. v. Original Trenton Cracker Co., C. A. No. 9780, October 30, 1947.

Froesch, et al. v. Libby-Owens-Ford Glass Co., C. A. No. 9865, May 5, 1948.

McKeown, et al. v. Garden State Hosiery Co., C. A. No. 10030, February 11, 1948.

Fourth Circuit

VIRGINIA—WESTERN DISTRICT

Cornett, et al. v. Hercules Powder Company, C. A. No. 319, November 28, 1947.

John D. Lewhorne, et al. v. Hercules Powder Company, C. A. No. 290, November 28, 1947.

Fifth Circuit

TEXAS—NORTHERN DISTRICT

Ford v. Southern Aircraft Corporation, C. A. No. 2375, Atwell, June 16, 1947.

TEXAS—SOUTHERN DISTRICT

Snyder, et al. v. Todd Galveston Dry Docks, Inc., C. A. No. 487, July 17, 1947.

ALABAMA—SOUTHERN DISTRICT

Farr v. Aluminum Ore Company, C. A. No. 687, McDuffie, June 16, 1947.

Sixth Circuit

OHIO—NORTHERN DISTRICT

Davis, et al. v. Formica Insulation Co., C. A. No. 24490, Jones, July 23, 1947.

Matheson and Saley v. Aluminum Co. of America and American Magnesium Corporation, C. A. No. 24441, Jones, September 1947.

Radden v. Aluminum Company of America, C. A. No. 24437, Jones, September 1947.

Bannister, et al. v. General Motors Corporation, C. A. No. 24557, Jones, September 17, 1947.

Neale, et al. v. General Motors Corporation, C. A. No. 24526, Jones, September 17, 1948.

Moughan v. General Motors Corporation, C. A. No. 24453, Jones, September 17, 1948.

OHIO—SOUTHERN DISTRICT

Heine, et al. v. Allis-Chalmers Mfg. Co., C. A. No. 1646, Druffel, June 13, 1947.

Whitehouse, et al. v. The American Rolling Mill Co., C. A. No. 1648, Druffel, June 2, 1947.

Whitehouse, et al. v. Sawbrook Steel Casting Co., C. A. No. 1654, Druffel, June 2, 1947.

Whitehouse, et al. v. William Powell Co., C. A. No. 1650, Druffel, June 2, 1947.

Whitehouse, et al. v. Hamilton Foundry & Machine Co., C. A. No. 1660, Druffel, June 2, 1947.

Whitehouse, et al. v. American Can Co., C. A. No. 1653, Druffel, June 4, 1947.

Lear, et al. v. Cleveland Automatic Machine Co., C. A. No. 1693, Druffel, June 9, 1947.

Coggshell, et al. v. Ford Motor Co., C. A. No. 1655, Druffel, August 25, 1947.

Whitehouse, et al. v. Aluminum Industries, Inc., C. A. No. 1662, Druffel, June 23, 1947.

Combs, et al. v. Standard Silicate Div., C. A. No. 1664, Druffel, June 2, 1947.

Notz, et al. v. General Motors Corporation, C. A. No. 766, Nevin, September 19, 1947.

Baker, et al. v. General Motors Corporation, C. A. No. 1656, Druffel, June 24, 1947.

Patton, et al. v. General Motors Corporation, C. A. No. 1657, Druffel, August 25, 1947.

Kenney, et al. v. General Motors Corporation, C. A. No. 767, Nevin, September 19, 1947.

TENNESSEE—WESTERN DISTRICT

Kirby, et al. v. General Motors Corporation, C. A. No. 1213, Boyd, February 28, 1948.

Gossett, et al. v. Proctor & Gamble Defense Corporation (22 cases), C. A. No. 399, Boyd, January 10, 1948.

KENTUCKY—EASTERN DISTRICT

Tisa v. American Suppliers, Inc., C. A. No. 533, June 27, 1947.

Seventh Circuit

ILLINOIS—NORTHERN DISTRICT

Workman v. E. I. duPont de Nemours & Co., C. A. No. 47-C-426, Campbell, October 3, 1947.

Thomas, et al. v. Chicago Plating Company, C. A. No. 47-C-46, Sullivan, November 24, 1947.

Malzone, et al. v. General Motors Corporation, C. A. No. 46-C-2103, Campbell, June 4, 1948.

Skup, 1352 Independence, Chicago—Individually and in behalf of Other Employees Similarly Situated v. General Motors Corporation, C. A. No. 47-C-520, Igoe, June 15, 1948.

Mattson, et al. v. General Motors Corporation, C. A. No. 47-C-21, Igoe, June 15, 1948.

INDIANA—SOUTHERN DISTRICT

Price, et al. v. General Motors Corporation, C. A. No. 1281, Baltzell, September 26, 1947.

Ashcraft, et al. v. General Motors Corporation, C. A. No. 223, Baltzell, September 26, 1947.

Stevens, et al. v. General Motors Corporation, C. A. No. 1286, Baltzell, September 26, 1947.

Lilly, et al. v. General Motors Corporation, C. A. No. 1285, Baltzell, September 26, 1947.

Stokes, et al. v. General Motors Corporation, C. A. No. 1305, Baltzell, September 26, 1947.

Brown, et al. v. General Motors Corporation, C. A. No. 1283, Baltzell, September 26, 1947.

Mueller, et al. v. General Motors Corporation, C. A. No. 1286, Baltzell, September 26, 1947.

Leonard, et al. v. General Motors Corporation, C. A. No. 1284, Baltzell, September 26, 1947.

WISCONSIN—WESTERN DISTRICT

Edwards, et al. v. General Motors Corporation, C. A. No. 1832, Stone, April 14, 1948.

Sands, et al. v. General Motors Corporation, C. A. No. 1830, Stone, April 14, 1948.

Adkins v. General Motors Corporation, C. A. No. 1831, Stone, April 14, 1948.

Eighth Circuit

MISSOURI—WESTERN DISTRICT

Breusing, et al. v. General Motors Corporation (Oldsmobile Division-Kansas City Plant), C. A. No. 4506, Duncan, December 9, 1947.

Breusing, et al. v. General Motors Corporation (Chevrolet-Kansas City Plant), C. A. No. 4498, Ridge, December 11, 1947.

MISSOURI—EASTERN DISTRICT

Schilling, et al. and Local No. 25, UAW-CIO v. General Motors Corporation, C. A. No. 5123, Hulen, April 30, 1948.

ARKANSAS—WESTERN DISTRICT

Hardesty v. Aluminum Company of America and Aluminum Ore Co., C. A. No. 315, September, 1947.

ARKANSAS—EASTERN DISTRICT

Hardesty v. Aluminum Company of America and Aluminum Ore Co., C. A. No. 1598, September, 1947.

Ninth Circuit

CALIFORNIA—SOUTHERN DISTRICT

Anger, et al. v. General Motors Corporation, Los Angeles Division, C. A. No. 6168W, Weinberger, November 17, 1947.

Armin, et al. v. Standard Oil Co. of Cal., C. A. No. 6190-PH, Hall, October 16, 1947.

Gibson, et al. v. Consolidated Vultee Aircraft Corp., C. A. No. 6277-BH, June 26, 1947.

Tenth Circuit

UTAH

Smith v. Geneva Steel Co., C. A. No. 1255, August 1, 1947.

Dispenza, et al. v. Utah Copper Company, C. A. No. 976.

Dispenza, et al. v. Utah Copper Company, C. A. No. 1253.

McKissick, et al. v. Park Utah Consolidated Mines Co., C. A. No. 1253.

Draper, et al. v. Silver King Coalition Mines Company, C. A. No. 1290.

Smyth, et al. v. New Park Mining Company, C. A. No. 1291.

Lester, et al. v. American Smelting & Refining Company, C. A. No. 1295.

Pratt, et al. v. American Smelting & Refining Company, C. A. No. 1296.

McCandless, et al. v. United States Smelting, Refining and Mining Company, C. A. No. 1297.

Michaelson, et al. v. United States Smelting, Refining & Mining Company, C. A. No. 1298.

Morton, et al. v. United States Smelting, Refining & Mining Company, C. A. No. 1299.

Cases, et al v. Utah Copper Company, C. A. No. 1310.

Gibbons, et al. v. Utah Ore Sampling Company, C. A. No. 1311.

KANSAS

Place, et al. v. Hercules Powder Co., C. A. No. 6076, Mellott, November 3, 1947.

Bennett, et al. v. Hercules Powder Co., C. A. No. 6093, Mellott, November 3, 1947.

Quincy, et al. v. Hercules Powder Co., C. A. No. 6124, Mellott, November 3, 1947.

McNealey, et al. v. Hercules Powder Co., C. A. No. 5993, Mellott, November 3, 1947.

Walker, et al. v. Hercules Powder Co., C. A. No. 6135, Mellott, November 3, 1947.

Allen, et al. v. General Motors Corporation, C. A. No. 6107, Mellott, February 24, 1948.

APPENDIX D

SUMMARY OF REPORTED AND UNREPORTED DISMISSALS BY DISTRICT COURTS OF "PORTAL-TO-PORTAL" ACTIONS UNDER SECTION 2 OF THE PORTAL-TO-PORTAL ACT

District Court	No. of Judges	Total Cases Dismissed
First Circuit		
D. Mass	1	17
Second Circuit		
W. D. N. Y.	1	6
S. D. N. Y.	6	25
N. D. N. Y.	1	1
D. Conn.	2	3
Third Circuit		
E. D. Pa.	2	2
W. D. Pa.	1	43
D. N. J.	3	29
Fourth Circuit		
D. Md.	2	2
W. D. Va.		2
Fifth Circuit		
N. D. Ga.	1	5
N. D. Tex	1	2
S. D. Tex	1	3
S. D. Ala.	1	1

District Court	No. of Judges	Total Cases Dismissed
Sixth Circuit		
E. D. Mich.	5	2
S. D. Ohio	2	14
N. D. Ohio	1	9
E. D. Tenn.	2	4
W. D. Tenn.	1	23
E. D. Ky.		1
Seventh Circuit		
N. D. Ill.	4	7
E. D. Ill.	1	2
S. D. Ind.	1	8
E. D. Wis	1	1
W. D. Wis	1	5
Eighth Circuit		
D. Minn.	2	5
S. D. Iowa	1	6
W. D. Mo.	3	8
E. D. Mo.	1	3
W. D. Ark.		1
E. D. Ark		1
Ninth Circuit		
D. Mont.	1	1
D. Idaho	1	28
D. Ore.	1	1
W. D. Wash.	1	4
E. D. Wash.	1	1
N. D. Cal.	3	6
S. D. Cal.	4	8

District Court	No. of Judges	Total Cases Dismissed
Tenth Circuit		
N. D. Okla.	1	1
E. D. Okla	1	1
D. Kans.	1	9
D. Utah		13
Total Districts	**Total Judges**	**Total Cases**
42	64	314

IN THE

Supreme Court of the United States

October Term, 1948

No. 320

JOSEPH G. BATTAGLIA, ARTHUR G. BECKER, et al.,
Petitioners.

vs.

GENERAL MOTORS CORPORATION, a Delaware Corporation

No. 321

FRANK HOLLAND and PETER J. ZANGHI, Individually, Etc.,
Petitioners.

vs.

GENERAL MOTORS CORPORATION

No. 322

WILLIAM S. HILGER, SAMUEL ZIEGLER and JOSEPH J. VILLELLA, Individually, Etc.,
Petitioners.

vs.

GENERAL MOTORS CORPORATION

NO. 323

WALTER J. CASHEBA, Individually, Etc.,
Petitioners.

vs.

GENERAL MOTORS CORPORATION

MOTION OF CHARLES J. MARGIOTTI, A MEMBER OF THE BAR OF THIS COURT FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES J. MARGIOTTI,
Amicus Curiae.

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INDEX

TABLE OF CASES CITED

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 320

Joseph G. Battaglia, Arthur G. Becker, et al.,
Petitioners,

vs.

General Motors Corporation, a Delaware Corporation

No. 321

Frank Holland and Peter J. Zanghi, Individually, Etc.,
Petitioners,

vs.

General Motors Corporation

No. 322

William S. Hilger, Samuel Ziegler and Joseph J. Villella,
Individually, Etc.,
Petitioners,

vs.

General Motors Corporation

No. 323

Walter J. Casheba, Individually, Etc.,
Petitioners,

vs.

General Motors Corporation

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned, as counsel for plaintiffs in the case of James J. Thomas, District Director, United Steel Workers of America, et al. vs. Carnegie-Illinois Steel Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

CHARLES J. MARGIOTTI,
Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF INTEREST

This Brief has been submitted for and on behalf of the plaintiffs in the case of James J. Thomas, District Director, United Steel Workers of America, et al. vs. Carnegie-Illinois Steel Corporation, which was appealed by the plaintiffs from the adverse final order and decree of the District Court of the United States for the Western District of Pennsylvania, at Civil Action No. 6112, to the United States Circuit Court of Appeals for the Third Circuit, at No. 9603. The facts and questions of law involved are similar to those recited in the captioned cases now before this Court, and, therefore, need not be repeated here. Arguments were heard by the United States Court of Appeals for the third Circuit on October 22, 1948, at which time the Court stated that it was interested in the petition for writs of certiorari filed before this Court in the captioned cases. Inasmuch as the interest involved in the captioned cases are so closely related and similar to those of the plaintiffs in the matters now pending before the United States Court of Appeals for the Third Circuit, the attached Brief is submitted for the consideration of the Court in support of the petition for writs of certiorari requested in the captioned cases.

II. ARGUMENT

POINT I.

The provision of the Portal-to-Portal Act purporting to affect the jurisdiction of the Courts cannot serve to validate the deprivation of plaintiffs' rights under the Fifth Amendment.

Congress did not stop with a declaration that employers should be relieved of liability in pending cases of the character here presented. It went further in the Portal-to-Portal Act by providing that no court should have "jurisdiction" to enforce those claims which Congress desired to outlaw.

It has long been established that "jurisdiction" means the power to hear and determine, to make any decision at all (*United States vs. Arredendo,* 6 Pet. 691, 8 L. ed. 547; *Grignon's Lessee vs. Astor,* 2 How. 319, 11 L. ed. 283; *United States vs. O'Grady,* 22 Wall. 641, 22 L. ed. 772; *State of Rhode Island vs. Commonwealth of Massachusetts,* 12 Pet. 657, 9 L. ed. 1233). And that power—the power even to proceed to consider an issue—is to be sharply distinguished from the power to afford relief upon the showing of a particular set of facts. The latter involves a determination on the merits, and the power to make such a determina-

tion in itself *imports* the existence of jurisdiction. As the Court said, in *Ex Parte Watkins*, 7 Pet. 568, 8 L. ed. 786, 788:

> "But the jurisdiction of the Court can never depend upon its decision upon the merits of the case brought before it but upon its right to hear and decide it at all."

And again, in *General Investment Company vs. New York Central Railroad Company*, 271 U. S. 228, 46 S. Ct. 496, 70 L. ed. 920:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (The Fair vs. Kohler Die & Specialty Co., 228 U. S. 22, 25, 57 Law ed. 716, 717, 33 Sup. Ct. Rep. 410; Geneva Furniture Mfg. Co. vs. S. Karpen & Bros., 238 U. S. 254, 258, 59 Law ed. 1295, 1297, 35 Sup. Ct. Rep. 788) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. (Illinois C. R. Co. vs. Adams, 180 U. S. 28, 34, 45 Law ed. 410, 412, 21 Sup. Ct. Rep. 251; Venner vs. Great Northern R. Co., 209 U. S. 24, 34, 52, Law ed. 666, 669, 28 Sup. Ct.

Rep. 328). If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

Congress may not obliterate the distinction between jurisdiction and the merits of a case simply by the use of a phrase. Where it, in truth, is seeking to establish a rule of decision, its employment of a "jurisdictional" reference will be given no effect by the courts. It is well to recall again at this point the language of the Court in *United States vs. Klein,* 13 Wall. 128, 20 L. ed. 519, 525:

> "It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."

There is no doubt as to the Congressional purpose in the Portal-to-Portal Act of 1947. For here, what Congress purported, in Section 2c of the Act, to establish as a jurisdictional test was, at the very same time and in specific terms, also made a rule for the determination of liability (Sec. 2a).

First of all, it was Congress's intent, in passing this Act to avoid the effect of certain decisions of this Court—decisions which declared a rule of liability and not of

jurisdiction. And what has thus been declared a rule of liability cannot suddenly be changed into the foundation for the exercise of any judicial power at all.

Secondly, if the issue of an employer's liability under the Act were in fact jurisdictional, a determination thereunder would be subject to collateral attack (e. g., *Elliott vs. Piersol's Lessee,* 1 Pet. 328, 7 L. ed. 164; *Johnson vs. Manhattan Railway Co.,* 289 U. S. 479, 53 S. Ct. 721, 77 L. ed. 1331). It is scarcely conceivable that Congress intended to place a judgment under the Portal-to-Portal Act in that category.

Thirdly, if this were a real limitation of jurisdiction over particular subject matter, it would have simply controlled the forum (e. g., Federal or State Court) or the remedy (e. g., injunction or action at law) or the conditions under which relief could be granted (e. g., exhaustion of certain remedies). But where the definition of jurisdiction is an agency for eliminating *all* liability, it becomes no more than a subterfuge for the exercise of forbidden power.

Though the courts have declared that there is no vested right to a particular form of remedy, they have, with equal consistency, declared that "a vested right of action is property in the same sense in which tangible things are property" *Pritchard vs. Norton,* 16 Otto 124, 27 L. ed. 104; see also *Gibbes vs. Zimmerman,* 290 U. S. 326, 332, 54 S. Ct. 140, 78 L. ed. 342; 2 Cooley, Constitutional Limitations, 756, (and cases there cited).

In the case of *Richmond Mortgage and Loan Corp. vs. Wachovia Bank and Trust Company,* 300 U. S. 124, 57 S. Ct. 338, 81 L. ed. 552, it was held:

> "The legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away."

In the present case no remedy is left to the plaintiffs. All avenues for securing relief—State and Federal—have been closed. What Congress has here done is precisely what the courts have said it cannot do within the framework of the Constitution.

In *Lockerty et al. v. Phillips, United States Attorney for District of New Jersey*, 63 S. Ct. 1019, 319 U. S. 182, this Court said:

> "Appellants argue that the command of Section 204 (d) that 'no court, Federal, State, or Territorial, shall have jurisdiction or power to * * * restrain, enjoin, or set aside * * * any provision of this Act' extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved, by statute or regulation, their day in court

to challenge its constitutionality. But the statute expressly excepts from this comment those remedies afforded by Section 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is 'not in accordance with law, or is arbitrary or capricious'. A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

That which is forbidden to Congress because it invades the constitutional rights of the American people does not suddenly become permissible because it is enclosed in a wrapper labelled "jurisdictional control." The Supreme Court has said that

> "* * * Under the mere guise of realizing something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results"
>
> *Nichols vs. Coolidge,* 247 U. S. 531, 71 L. ed. 1124.

Jurisdiction, too, is a very real thing, and statutes affecting it are "estimated by practical results." As already seen, in *United States vs. Klein, supra,* the Court refused to sanction an effort on the part of Congress to exceed the bounds of its authority simply because it termed its action a measure to control the jurisdiction of courts. The Court looked to the reality behind the words.

All of the "great substantive powers of Congress" are "subject to the Fifth Amendment." So the Court said, in

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 589, 55 S. Ct. 854, 79 L. ed. 1593, 1604, citing the innumerable authorities establishing the proposition that the Fifth Amendment limits the exercise of even the war power, the power to tax, the power to regulate commerce and the power to exclude aliens. The power over the jurisdiction of the courts is no exception. There is no doctrine which varies the effectiveness and the meaning of deprivation of property or of due process of law on the basis of the particular congressional power to which the Fifth Amendment is applied. The destruction of plaintiffs' rights is, beyond doubt a deprivation of their property without due process of law. It is that whether accomplished under the commerce power, the bankruptcy power, the war power, or the power to control the jurisdiction of the courts.

POINT II.

The Portal-to-Portal Act of 1947 is unconstitutional in that it deprives the plaintiffs herein of their property and vested rights without due process of law in violation of the Fifth Amendment.

No proposition has been more firmly established in our jurisprudence than that under the American constitutional system a Legislature cannot take what belongs to one man and arbitrarily give it over to another, cannot appropriate the property of any individual in the United States for the use of the Government without the payment of just compensation therefor, cannot reach into the past to upset transactions already completed and nullify rights already vested in accordance with law. The courts have unhesitatingly struck down attempted invasion of vested rights, and of attempted destruction by the Legislature of causes of action already accrued even where national policy and the immediate equities were on the side of the invading legislation. *Forbes Pioneer Boat Line vs. Everglades Drainage District,* 258 U. S. 338, 66 L. ed. 647, 42 S. Ct. 325; *Osborne vs. Nicholas,* 80 U. S. 654, 20 L. ed. 689; *Steamship Co. vs. Joliffe,* 69 U. S. 450, 17 L. ed. 805, 2 Wall. 450; *Hathorn vs. Calef,* 69 U. S. 10 2 Wall. 10, 17 L. ed. 776; *Ochiltree vs. Railroad,* 88 U. S. 249, 21 Wall. 249, 22 L. ed. 546; *Ettor vs. City of Tacoma,* 33 S. Ct. 428, 228 U. S. 148, 57 L. ed. 773; *Coombes vs. Getz,* 52 S. Ct. 435, 285 U. S. 434, 76 L. ed. 866.

Thus, in *Osborne vs. Nicholson*, 80 U. S. 654, 20 L. ed. 689, it was stated:

> "*Rights acquired by* a deed, will or contract of marriage, or other contract executed *according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force.* This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils." (Italics added).

So insistent was the Court upon adherence to this doctrine that it refused to interpret even the Thirteenth Amendment as having the effect of divesting the seller of a slave of his right to the purchase price in the absence of a specific provision to that effect in the Amendment, and it declined to permit its antipathy for the institution of slavery to govern its judgment as to the propriety of the legislative action thus taken. The Court said:

> "Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy—as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficiency from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the

civil law, is there anything to warrant the result contended for by the defendants in error."

Again, in *Ettor vs. City of Tacoma*, 228 U. S. 148, 33 S. Ct. 428, an action had been brought under the terms of a statute of the State of Washington to recover compensation from the municipality for damage to the plaintiff's property resulting from street grading. While the action was pending the statute under which it was brought was repealed, and the suit was dismissed. The court however held:

"The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common law action for a breach of the statutory obligation."

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.*" (Italics added.)

What was the nature and status of the rights of the plaintiffs herein at the time of the adoption of the Portal-

to-Portal Act of 1947? They had worked, they had expended their time and their energy, they had performed services for the defendant. Having done so, they had unquestionably earned the right to receive the compensation prescribed by the Fair Labor Standards Act for all of the time so devoted to the interest of the defendant, including compensation at one and one-half times the regular rate of pay for all hours worked in each week above the statutory maximum. This right had accrued at the time those activities had been performed *in* the interest of the defendant. The obligation of the defendant to pay was then complete. And suit had been instituted to recover what was clearly and unequivocally then due.

The existence of the defendant's obligation at the time of the passage of the Portal-to-Portal Act is not in dispute. Congress itself acknowledged that obligation and recognized its validity under existing law. For it adopted the Portal-to-Portal Act avowedly to avoid "the payment of such liabilities." Thus, it adopted a statute expressly for the purpose of enabling the defendants to avoid a recognized liability, for the purpose of removing all machinery which might enable plaintiffs to enforce their right, and for the purpose of nullifying the right to compensation for work and labor done.

It has never been held that a right or an obligation was removed from the protection of the Constitution merely by virtue of the fact that such obligation or such right would not have existed except for a particular statutory provision. Such a notion would repudiate the very basis for the doctrine of vested rights as enunciated by Justice Marshall—the maintenance of the supremacy of the law. For

there is no principle which places non-statutory law or private contracts on any higher plane than legislative enactment.

What the courts have considered of importance is whether the conditions precedent to the enforcement of the statutory right had been met, *whether anything had been done* by the claimants to perfect their right, whether consideration had been given or injury suffered as prescribed by the law. If those conditions were present, then the right vested, whether statutory or not. And the fact is that in almost all of the cases denying to a legislative body the power to nullify vested rights, the right was founded squarely upon the existence of a statute.

Thus, in *Ettor vs. Tacoma, supra,* we have seen that the right held to be constitutionally protected against retroactive legislative invasion was the right to sue a municipality under the terms of a State statute. *No right to do so would have existed in the absence of that statute.* Still the Court refused to allow the right to be retroactively vacated.

Similarly in *Coombes vs. Getz, supra,* a section of the California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who contracted with the corporation were suing a director to enforce their rights, that section making the director liable was repealed. There is no doubt that in the absence of the original provision in the California Constitution there would have been no liability on the part of the director, yet the Supreme Court, in permitting the creditor to recover despite the repealing statute, stated:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. *It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right. Ettor vs. Tacoma, supra; Pritchard vs. Norton, supra), to enforce his cause of action upon the contract. Ettor vs. Tacoma, supra; Hawthorne vs. Calef, supra; Steamship Co. vs. Joliffe, supra; Ochiltree vs. Railroad Co., supra; Harrison vs. Remington Paper Co., supra; Knickerbocker Trust Co. vs. Myers, supra.*" (Italics added).

Again, in *Steamship Co. vs. Joliffe*, 69 U. S. 450, 17 L. ed. 805, 2 Wall. 450, the Court held:

"The claim of the plaintiff below for half pilotage fees, resting upon a transaction regarded by law as quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a*

vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed." (Italics added.)

In the same way, where under the terms of an Act of Congress members of the Chocktaw and Chickasaw tribes who relinquished their rights to communal lands were given individual plots of a given number of acres as their private property and were granted a 21-year tax exemption provided that the land was not alienated, the Supreme Court of the United States held that those who accepted the plots under those conditions and gave the consideration prescribed by the statute, thereafter had a vested right in the tax exemption and the right could not be divested by subsequent legislation. *Choate vs. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. ed. 941. *The right to the tax exemption vested exclusively upon the statute*, but that fact did not deter the Court from asserting its inviolability.

In *Osborne vs. Nicholson, supra*, we have seen that the Court specifically referred to the vesting of a right *under a statute*. And likewise in *Hathorn vs. Calef*, 69 U.S. 10 17 L. ed. 776 2 Wall. 10, and *National Surety Corp. vs. Wunderlich*, 111 F. (2d) 622 (8 C. C. A. 1940), rights were protected against divestment by retroactive legislation although in each case they were founded exclusively upon statute. If we examine the cases in which the Courts have applied the principle that statutory rights do not vest, that they may be defeated by a repeal of the statute which

created them, we shall clearly see that the principle has application in entirely different circumstances from those here involved.

Where a right based upon a statute is purely executory, is entirely conditioned upon an eventuality which has not materialized at the time that the statute is repealed, such repeal and the removal of the right have been held to be valid. Thus, in *Pearsall vs. Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. ed. 838, it appeared that the Legislature had adopted a statute removing the power of a corporation, originally granted by its charter, to consolidate with other lines. Thereafter the corporation sought to engage in a consolidation and was prevented from doing so by the operation of that later statute. The Court held that under these circumstances no vested rights had been disturbed since the power to consolidate had not been exercised at the time the repealing Act was passed, but followed if the consolidation had already taken place in accordance with the earlier grant of power and if the repealing Act had been applied so as to invalidate a consolidation so completed prior to its passage.

In the present case the plaintiffs involved have performed all of the acts necessary to establish their right to recovery under the Fair Labor Standards Act. They have contributed their time and their energy to their employer for his gain. They have engaged in activities which this Court has held entitles them to the statutory rate of compensation. *Anderson, et al. vs. Mt. Clemens Pottery Co.*, 308 U.S. 680, 66 Supreme Ct. 1187. They have *earned* the right to that compensation. Just as in *Ettor vs. Tacoma, supra*, when the "amending" statute was here passed,

"nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage."

Never has this Court approved a doctrine which would allow the destruction of a right such as is here involved, a right which is neither a mere expectancy, nor a mere contingency, but a right for compensation for services rendered and damages inflicted in violation of law. Such a doctrine would not be an exception to the rule against the protection of vested rights. It would be a subversion of the principle itself. It would be a negation of the *Ettor, Coombes, Forbes Pioneer Boat Line, Joliffe (supra)*, and all other cases placing rights vested under a statute within the protection of the Constitution.

The 80th Congress possessed no constitutional veto power over its predecessors' actions under which certain rights have become vested. Yet that is precisely what the 80th Congress has sought to do here. It has sought to upset for the past that which a previous Congress insisted should be done. It has sought to veto the actions of its predecessors. If such a result can be accomplished, then rights and obligations will never be secure. The evil which Justice Rutledge saw in *Schneiderman vs. United States*, 320 U.S. 118, 63 S. Ct. 1333, 87 L. ed. 1796, in the lack of finality in the judgment of a Court with regard to a particular set of facts, is present in the lack of finality in the judgment of a Congress upon the basis of the facts it considers significant during the period in which it retains power. Justice Rutledge said:

> "The effective cancellation (of naturalization) is to nullify the judgment of admission. * * * That it is

a judgment, and one of at least a coordinate court, which the cancellation proceedings attacks and seeks to overthrow, requires this much at least, that solemn decrees may not be lightly overturned and that citizens may not be deprived of their status merely because one judge views their political and other principles with a more critical eye or a different slant, however, honestly and seriously, than another."

It is equally true that a declaration as to rights and obligations by one Congress during the period in which it had power to declare those rights and obligations should not be upset by another Congress reaching back to that original period. There would, under those circumstances, be no stability in law. Persons acting in accordance with the rules laid down by one Congress might find themselves at a serious disadvantage not because they violated but rather because they obeyed the law. They might find that a later legislative body has made the conduct which had theretofore been considered legal, illegal for the precise period during which this legality had been appropriately declared.

The Fair Labor Standards Act was enacted in 1938. Employers paid their employees in accordance with their interpretation of the Act. In June of 1946, this Court interpreted the Act of Congress and stated that the words "work week" under the Act, should include all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place. This is the famous Portal-to-Portal case, and is reported as *Anderson, et al. vs. Mt. Clemens Pottery Co., supra.*

Argument

The Administrator and the Courts repeatedly and consistently enunciated the doctrine that working time under the Fair Labor Standards Act was in no sense to be limited to what was expressly provided in contracts or what was done under past custom or practice. In a series of three decisions, *Tennessee Coal & Iron Co. vs. Muscoda Local 123,* 321 U.S. 590, 64 S. Ct. 698; *Jewell Ridge Coal Corp. vs. Local* 6167, *United Mine Workers of America,* 325 U.S. 161, 65 S. Ct. 1063; *Anderson vs. Mt. Clemens Pottery Co.,* 328 U.S. 680, 66 S. Ct. 1187, this Court sustained the interpretation which had theretofore been given to the Act and held that all time worked should be compensable time.

It is a well known proposition of law that the applicable substantive law of the State or the United States in force on the date of the making of a contract, becomes part and parcel thereof just as clearly and distinctly as though the law were written into the contract. It is also true that if such law subsequently enacted announces a public policy, that law becomes applicable to the existing contract: *Compania De Inversiones I. vs. Industrial Mortgage Bank,* 198 NE 617, 69 N.Y. 22.

In *Home Building & Loan Assn. vs. Blaisdell,* 290 U.S. 398, 435, 54 Supreme Court, 231-239, it is held that:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

To the same effect in *Gelfert vs. National City Bank of New York,* 313 U.S. 221, 61 Supreme Court, 898-901.

In *Malone vs. Hayden*, also known as *Teachers Tenure Act Cases*, 329 Pa. 213, 197 Atl. 344, the Supreme Court of Pennsylvania applied the same principle to contracts of teachers, and at page 353 referred to the various decisions of the Federal Supreme Court on the subject quoting from *Home Building & Loan Assn. vs. Blaisdell, supra.*

So absolute is the right to overtime pay and to wages as set out in the Act, that this Court in a number of decisions explicitly decided that a claim for the same cannot be released or compromised: In *Brooklyn Savings Bank vs. O'Neil*, 324 U.S. 697, 65 Supreme Court 895, 89 L. ed. 1296; it was held that an employee's written waiver of his right to liquidate damages under the Fair Labor Standards Act did not bar a subsequent action to recover such liquidated damages, and also that a statutory right conferred on a private party but not affecting the public interest may not be waived or released as such waiver or release contravenes the statutory policy; where a private right is granted in the public interest to effectuate the public waiver of a right so changed or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate (page 901).

> *D. A. Schulte Inc. vs. Gangi*, 328 U.S. 108, 66 Supreme Court, 925, 928.

In *Northwestern Yeast Co. v. Broutin*, 133 F. 2d 628, at pages 630 and 631, the court stated that the contract between the employer and employee contained the provisions required by law and as such became part and parcel of the contract. Any remedy to which employee was entitled, was

under the contract itself and not by suit based solely on the act.

Again in *Crabb vs. Welden Bros.*, 164 F. 2d, 797 at 802, the court in finding that the provisions of the Fair Labor Standards Act is part of every contract of employment said:

> "The Fair Labor Standards Act presupposes a contract of employment and in that sense an action to recover overtime is an action on contract. Republic Pictures Corp. v. Kappler, supra; Northwestern Yeast Co. v. Broutin, 6 Cir., 133 F. 2d, 628. In order to recover under the Fair Labor Standards Act the employee must have been engaged in interstate commerce. When so employed that act becomes a part of his contract, but if not so employed that act has no bearing upon his contract."

It is true that the Courts have repeatedly held that there is no vested right to a particular form of remedy. In such cases as *Gibbes vs. Zimmerman,* 290 U.S. 326, 54 S. Ct. 140, 78 L. ed. 342; *Home Building & Loan Assoc. vs. Blaisdell,* 290 U.S. 398, 54 S. Ct. 231, 78 L. ed. 413; *Ex Parte McCardle,* 7 Wall. 506, 19 L. ed. 264; *Baltimore and Potomac R. R. Co. vs. Grant,* 8 Otto 398, 25 L. ed. 231; *Richmond Mortgage & Loan Corp. vs. Wachovia Bank & Trust Co.,* 300 U.S. 124, 57 S. Ct. 338, 81 L. ed. 552, and *Norman vs. Baltimore and Ohio R. R. Co.,* 294 U.S. 240, 55 S. Ct. 407, 79 L. ed. 885. But in all such cases, the Courts based their determination on the fact that the new statute left the basic right unimpaired. *The form of the remedy was altered but some remedy remained.*

Here, however, the Portal-to-Portal Act of 1947 destroys the right. It leaves no remedy, no means at all for securing the compensation due to the plaintiffs. It was designed precisely to wipe out the "liability". It is accordingly, as invalid as was the statute considered by the Court in *Louisville Joint Stock Land Bank vs. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. ed. 1593, where it was found that all effective remedy was destroyed.

In *Graham vs. Goodcell*, 282 U.S. 409, 51 S. Ct. 186, 75 L. ed. 415, the Court distinguished the vested interest cases from a case in which a retroactive statute did not invade any rights but merely cured an administrative defect in favor of the Government. A suit was brought to recover taxes illegally collected because they were barred by the statute of limitations. An Act was passed removing the right to recover in those cases while the suit was pending. The delay which had postponed the collection of the taxes beyond the statutory period had occurred because the taxpayers had been negotiating concerning their payment with the Treasury Department. The Treasury Department, in turn, had mistakenly assumed that the Statute of Limitations would not apply under those circumstances.

The Court held that the subsequent act of Congress was valid and dismissed the suit saying:

> "The question is whether these circumstances remove the case from the operation of the *general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed.* Pacific Mail S.S. Co. vs. Joliffe, 2 Wall. 450, 457, 458, 17 L. ed. 805,

807; Ettor vs. Tacoma, 228 U.S. 148, 156, 57, L. ed. 773, 778, 33 S. Ct. 428; Forbes Pioneer Boat Line vs. Everglades Drainage Dist., 258 U.S. 338, 340, 66 L. ed. 647, 649, 42 S. Ct. 325."

There is no merit in the argument that the compensation sought by the plaintiffs is in the nature of a penalty. On the contrary, what the plaintiffs are seeking here is a just return for the labor they have expended in behalf of the defendant and compensation for the injury they have suffered as a result of the defendant's failure promptly to meet its just liabilities. In *Brooklyn Savings Bank vs. O'Neil,* 324 U.S. 697, 707, 65 S. Ct. 895, 89 L. ed. 1296, 1309, this Court has laid to rest any suggestion that even the liquidated damage provision of the Fair Labor Standards Act is in the nature of a penalty, unequivocally stating:

> "We have previously held that the *liquidated damage provision is not penal in its nature* but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages. Overnight Motor Transp. Co. vs. Missel, 316 U.S. 572, 86 L. ed. 1682, 62 S. Ct. 1216.

POINT III.

The Congressional finding of a national "emergency" cannot serve to validate the Portal-to-Portal Act as a proper use of the power to regulate commerce.

In Section 1 of the Portal-to-Portal Act, Congress stated that it "finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this act be enacted." Thus Congress sought to justify its action in adopting this drastic legislation by making certain "findings" indicating the existence of an "emergency".

This so-called "emergency" was the result of the excessive newspaper publicity given to the Seven Billion Dollar figure as the estimated total amount of all claims filed in federal courts. These claims were said to have been precipitated by the decision in the case of *Anderson vs. Mt. Clemens Pottery Co., supra*; yet the plaintiffs in that case failed to recover anything because of the de minimus rule. This rule may also result in similar findings in some or all of the portal-to-portal cases now pending.

The total amount sued for in each case is merely an estimate, usually the maximum figure plaintiffs hope to recover, and is never proof of the amount of the debt or liability. It has been said that approximately no more than 5 percent of the amount claimed in these various Complaints is now recoverable in said portal-to-portal suits.

The "emergency" was thus a mere fiction—a product of vivid imagination. But even assuming an "emergency" existed, such emergency could never create a power which theretofore did not exist. Congress, by a mere finding of an "emergency" cannot avoid the constitutional limitations on its authority. *Home Building & Loan Association vs. Blaisdell,* 290 U.S. 398, 426, 54 S. Ct. 231 78 L. ed. 413, 422; *Wilson vs. New,* 243 U.S. 332, 348, 37 S. Ct. 298, 61 L. ed. 755, 773; *Louisville Joint Stock Land Bank vs. Radford,* 295 U.S. 555, 55 S. Ct. 854, 79 L. ed. 1593; *Terry vs. Anderson,* 95 U.S. 628, 24 L. ed. 365; *Ex parte Milligan,* 4 Wall 2, 18 L. ed. 281.

These cases clearly establish the proposition that, no matter how pressing the emergency, no matter how extreme the requirements of the Nation may be, Congress may not exercise an authority which is forbidden to it by the Constitution. And in these cases, the Court was faced with legislative efforts to deal with situations far more fraught with danger to the public interest than are presented by the congressional recitals in the Portal-to-Portal Act of 1947, even if those recitals were accepted at their full face value.

The Court was unequivocal in *Louisville Joint Stock Land Bank vs. Radford, supra,* when it said that "the Fifth Amendment commands that *however great the nations need,* private property shall not thus be taken *even for a wholly public use* without just compensation." (Italics added.) It was unequivocal in *Terry vs. Anderson,* 95 U.S. 628, 24 L. ed. 365, when it held that remedial legislation, but not the impairment of the obligation of a contract, the destruction of a vested right was called for in a situation

where "the business interests of the entire people of the State had been overwhelmed by a calamity common to all", where "society demanded that extraordinary efforts be made to get rid of old embarrassments and permit a reorganization upon the basis of a new order of things."

But nowhere was this principle more forcefully stated than in *Ex parte Milligan, supra.* There, it was held that not even the emergency of war for the survival of the Union could justify the invasion of the rights protected by the Constitution. The Court solemnly declared:

> "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism* * * *." (Italics added.)

During the course of the Congressional debates, sponsors of the Portal-to-Portal Act sought refuge in the deci-

sion of the Supreme Court in the so-called "gold clause" cases, particularly *Norman vs. Baltimore & Ohio R. R. Co.*, 294 U.S. 240, 55 S. Ct. 407, 79 L. ed. 885. It was asserted that that decision stands as authority for the proposition that an emergency justifies retroactive legislation vacating vested rights. The Court there upheld the constitutionality of the invalidation by Congressional Act of the so-called "gold clauses", in private contracts, holding that Congress had the exclusive power to regulate the monetary system, that the regulation it had imposed was a reasonable one, simply altering the conditions under which the liability could be enforced without impairing the liability itself, and that no private contract could operate to restrict the congressional power in its lawful sphere.

Similarly, in *Louisville & Nashville Railroad Company vs. Mottley*, 219 U.S. 467, 31 S. Ct. 265, 55 L. ed. 297, a release had been executed by an individual to a railroad company after an accident causing damage to the individual. The release was granted in consideration of a free pass for transportation on the railroad given to the defendant and his wife for the duration of their lives. After the release had been made and the free transportation has been granted for a number of years, an Act of Congress was passed making free passes illegal. The railroad then refused to reissue a pass and a suit demanding specific performance was instituted.

The Court here held that the legislation constitutionally invalidated the provisions of the release on the ground that a private contract could not stand in the way of the exercise by Congress of its constitutional power.

But the Act involved in said case was not retrospective, and it has never been cited as authority for the proposition that Congress can wipe out vested rights through retroactive legislation. The Act applied to future acts, i.e., the granting of passes in the future. Another distinguishing feature is that the Portal-to-Portal Act leaves our plaintiffs with no remedy whatever by which they could enforce their claims of payment for services already rendered before its passage. Whereas, in the Mottley case, supra, the plaintiffs could still avail themselves of other remedies in seeking redress against the railroad company for the personal injuries they sustained, the basic right remaining unimpaired. The public policy behind the Act involved in the said Mottley case was to avoid discriminatory and unequal railroad fare rates, while the only public policy behind the Portal-to-Portal Act is that it would harm industry if it must pay for services it had already received.

Finally, in *Philadelphia B. & W. R. Co. vs. Schubert*, 224 U.S. 603, 32 S. Ct. 589, 56 L. ed. 911, the Court in sustaining an Employer's Liability Act against the contention that it could not invalidate a private contract providing for certain payments to an employee in lieu of any other remedy for an employer's liability, said:

> "Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution

of its policy. To subordinate the exercise of the Federal authority to the *continuing operation* of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, *Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.*'' (Italics added.)

Is it not obvious that these cases, far from militating against plaintiffs' present claim, serve to fortify their position? The plaintiffs here are not arguing against the legislative destruction of obligations which became due *after* the passage of the Portal-to-Portal Act. Plaintiffs here are complaining of the destruction of obligations *already due and payable,* of ''debts already contracted''. Plaintiffs are here complaining, not of a limitation of liability by reason of what might take place ''*after*'' Congress has acted. They are complaining of the destruction of a liability complete and due *before* the action of Congress took place.

There is not here involved a contract between private parties which stands in the way of an Act of Congress, and plaintiffs are claiming no vested right in the ability to do, in the future, after Congress acts, what they did before.

And the doctrine, therefore, that Congress may, in appropriate circumstances, take action in spite of the fact that its action interfere with the obligation of private contracts, has no relation to the instant problem at all.

POINT IV.

The Portal-to-Portal Act of 1947 represents an attempt by Congress to exercise judicial power in violation of Article III of the Constitution of the United States: It thus deprives the plaintiffs of their property without due process of law in contravention of the Fifth Amendment.

The principle of the separation of powers as enunciated in the Constitution, the endowment of Congress with exclusive legislative power, of the President with exclusive executive power, of the Courts with exclusive judicial power, the prohibition against the encroachment of one branch upon the sphere reserved for each of the others are the very heart and core of our constitutional system.

This Court has unhesitatingly struck down attempts on the part of the legislature to invade the judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn vs. Thompson,* 13 Otto 168, 26 L. ed. 377; *Ogden vs. Blackledge,* 2 Cranch 272, 2 L. ed. 276; *Reynolds vs. McArthur,* 2 Peters 417, 7 L. ed. 470; *United States vs. Klein,* 13 Wall. 128, 20 L. ed. 519; *Baltimore & Ohio R. R. Co. vs. United States,* 298 U.S. 349, 56 S. Ct. 797, 80 L. ed. 1209.

And for the same reason those provisions of the Portal-to-Portal Act of 1947 which purport to destroy the present cause of action must likewise be struck down. In enacting

those provisions, Congress has unquestionably yielded to "those powerful and growing temptations * * * to overstep the just boundaries of (its) own department and enter upon the domain of the others." *Kilbourn vs. Thompson, supra.*

What is the judicial power which Congress is forbidden to exercise, which is reserved exclusively to Courts? What is the essence of the legislative power which is within the exclusive province of Congress under the Constitution? How have the "lines which separate and divide these departments" been "broadly and clearly defined?"

In *Marbury vs. Madison,* 1 Cranch, 137, Justice Marshall answered:

> "It is emphatically the province and duty of the judicial department to say what the law is."

And in *Webster vs. Cooper,* 55 U.S. 488, 14 L. ed. 510, the judicial power was thus described:

> "The exposition of both (statute and constitution) belongs to the judicial department of the government, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their Constitution. * * *"

Mr. Justice Field, dissenting in the Sinking Fund Cases, 25 L. ed., at 516, emphatically declared (and his opinion in this regard was not disputed by the majority):

> "To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable,

or to other and greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power; and all such power, with respect to any transaction arising under the laws of the United States is vested by the Constitution in the Courts of the Country."

And Justice Holmes, in two opinions characterized by his usual incisiveness, epitomized the basic distinction between the judicial and the legislative power. First, in upholding a statute against an attack that it represented a legislative invasion of the judicial domain, he said:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." (*James vs. Appel,* 192 U.S. 129, 48 L. ed. 377).

Then in *Prentis vs. Atlantic Coastline Co.,* 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. ed. 150, 158, he stated his conclusion in the following terms:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Here, then, is the test to be applied. Does the action of Congress in the passage of the Portal-to-Portal Act of 1947

look to the future and change existing conditions "by making a new rule to apply thereafter to all or some part of those subject to its power", or does it, on the contrary, declare and enforce liabilities as they stand on facts and under laws existing at the time of the adoption of that legislation? Does it define a proper course of conduct for the future, or does it pass judgment on and prescribe a new rule for decisions in pending cases?

Whatever might be said of the portions of the Portal-to-Portal Act which prescribe rules for the future, its provisions for retroactive operations—the provisions with which we are concerned here—fall clearly under the head of "judicial action" as thus defined. These provisions "declare liabilities * * * on present or past facts"; they say "what the law is"—and what the law was as to liability long before they were in effect; they determine the sum payable to plaintiffs by defendant under the employment relationship in existence prior to their adoption. These provisions operate in precisely the sphere in which the Courts can take—and have taken—action.

And fortunately, Congress did not leave its object to speculation. It stated its design and purpose in the opening paragraph of the Statute itself.

The 80th Congress was dissatisfied with the result arrived at by the Court in the *Mt. Clemens case, supra.* It felt that the judicial interpretation of the rights and liabilities created by the Fair Labor Standards Act would be harmful and was improper. It put its criticism of that judicial interpretation in Section 1 of the Act where it stated:

"The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation."

Congress thus chose to declare that the liabilities enunciated by this Court should not be enforced. It was in order to avoid the normal and proper effect of the Court's determination in pending cases that Congress avowedly adopted the Portal-to-Portal Act. It is equally clear that Congress has presumed to change those decisions, to nullify them, to interfere with the declaration and enforcement by the Court of liabilities as they stand on present or past facts. The Congress did not, in passing the Portal-to-Portal Act, look entirely to the future in order to change conditions and make a new rule to be applied thereafter. On the contrary, it sought to change a rule already adopted and to change it for a period during which it had no competence whatsoever.

It was said in *United States vs. O'Grady's Executors,* 89 United States 641, 22 Wall. 641, 22 L. ed. 772:

"Judicial jurisdiction implies the power to hear and determine a cause and, inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to re-examination and revision of any other tribunal or any other department of the Government."

And again Cooley, at page 190, Volume I of his Constitutional Limitations, states the rule as follows:

> "But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the court, in the exercise of their undoubted authority, have made; for this would not only be the exercise in the most objectionable and offensive form, for the legislature would in fact act as a court of review to which parties might appeal when dissatisfied with rulings of the court."

In the Portal-to-Portal Act, we are faced more clearly than at any time in American Constitutional history with precisely such an effort on the part of Congress " to act as a court of review to which parties may appeal when dissatisfied with rulings of the Court," to "subject the judgments of the Supreme Court to re-examination and revision" by Congress itself.

Once before Congress attempted a blatant invasion of the prerogatives of the judicial department. In April of 1870, the Supreme Court rendered its decision in *United States vs. Padelford,* 9 Wall., 531, holding there that a participant in the rebellion against the United States was entitled to recover from the Treasury of the United States the value of his property seized and sold during the course of the Civil War, provided he had taken a certain oath under the terms of a presidential pardon. Congress was dissatisfied with this decision, and shortly after it was announced, sought to avoid its effect. It accordingly adopted legislation which purported to deprive the courts of jurisdiction in a case where the claim was based upon

the taking of the oath discussed in the *Padelford case.* In effect the enforcement of the legislation would have required the application of a rule to an existing set of facts contrary to that which the Court had declared was appropriate.

The Court unhesitatingly declared that such a statute was an invasion of the judicial power, that the deprivation of jurisdiction was a subterfuge for directing a decision of the Court on an existing set of facts contrary to that which otherwise would have been made. If the statute had really been designed to control the jurisdiction of the Court of Claims and of the Supreme Court it would have been valid. "But", said the court (in *United States vs. Klein,* 13 Wall., 128, 20 L. ed. 519):

> " • • • the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty • • •
>
> "It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court.

"We are directed to dismiss the appeal if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the Legislature may prescribe rules of decision to the Judicial Department of the Government in cases pending before it? • • •

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

The analogy to the situation presented in the present case is striking. Here, too, the Congress has purported to pass an Act withholding jurisdiction from the courts "as a means to an end." Here, too, "the great and controlling purpose" of Congress is to deny to the provisions of the Fair Labor Standards Act of 1938 "the effect which this court had adjudged (it) to have." Here, too, "the denial of jurisdiction to this court • • • is founded solely on the application of a rule of decision, in causes pending pre-

scribed by Congress." Here, too, the Court cannot give effect to the Congressional action "without allowing that the Legislature may prescribe rules of decision to the judicial department of the government in cases pending before it."

Indeed the only difference between the situation in the *Klein* case and that now before us is that Congress in passing the Portal-to-Portal Act has gone much farther than did the Congress of 1871. For here Congress has baldly asserted its intention to invalidate the decision of the Supreme Court, has unequivocally declared its intention to substitute a new rule of decision for that judicially announced. Here there is no subtlety, no innuendo. If in the *Klein* case Congress "passed the limit which separates the legislative from the judicial power" then here it has forgotten that limit altogether.

Therefore, the writs of certiorari prayed for at Nos. 320, 321, 322, and 323 of October Term, 1948 should be granted.

Respectfully submitted,

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Amicus Curiae.